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(\* but were afraid to ask)

Floyd Scott Risley

Major

United States Air Force

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The George Washington University  
Law School

ABSTRACT

This effort explores the statute of limitation ("SOL") issues facing DOD agencies seeking reimbursement for GOCO- (Government-Owned Contractor-Operated military industrial facilities) related voluntarily initiated environmental response costs pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. The SOL for such reimbursement varies drastically depending upon the legal basis for the reimbursement action and the United States Circuit Court of Appeals circuit in which it is brought. For instance, one circuit has held that there is no federal cause of action to recoup costs for such voluntary cleanups unless the plaintiff is the recipient of an abatement order

or embroiled in litigation. Under that holding, CERCLA SOLs are not even an issue since the court decided that state-based claims for contribution are the only available remedy for such plaintiffs. Conversely, the SOL for reimbursement actions in the other circuits can range from as short a period as three years to there being no time-bar whatsoever.

As a foundation, the effort also examines what GOCOs are, how they evolved, and how, as a creature of contract, indemnification comes into play. It also explores, from a policy perspective, if GOCO DOD-agency-owners should, and if they should, how they should, seek environmental response cost reimbursement from their contractor-operators.

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EVERYTHING YOU ALWAYS WANTED TO KNOW  
ABOUT STATUTE OF LIMITATION ISSUES FOR RECOVERY  
OF/CONTRIBUTION TO ENVIRONMENTAL RESPONSE COSTS UNDER  
CERCLA AS THEY RELATE TO GOCOs  
(\* but were afraid to ask)

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(\* but were afraid to ask)

*Share everything.  
Play fair.  
Don't hit people.  
Put things back where you found them.  
Clean up your own mess.<sup>1</sup>*

SECTION I

INTRODUCTION: CERCLA - CLEAN UP YOUR OWN MESS

The Comprehensive Environmental Response, Compensation, and Liability Act<sup>2</sup> ("CERCLA") was probably the last thing on his mind when Rev. Robert Fulghum penned these words as partial substantiation of his claim that he learned in kindergarten everything he really needed to know about life. Nevertheless, these statements and the underlying principles they espouse --responsibility, equity, and accountability-- capture much of the spirit Congress intended when it enacted CERCLA's liability scheme back in 1980 and the Superfund Amendments and Reauthorization Act ("SARA") in 1986. Though most of CERCLA deals with how environmental cleanup will be conducted, its allocation

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<sup>1</sup> ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN 6 (Villard Books 1990) (1986).

<sup>2</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994).

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provisions are no less significant. Grossly oversimplified, one of CERCLA's objectives is to provide a mechanism or legal framework under which potentially responsible parties ("PRPs") who shared in creating an environmental "mess" can arrive at a fair and equitable way to share in the responsibility for cleaning it up.

This, of course, is of vital importance to the Department of Defense ("DOD") which is involved in the cleanup of dozens of past- or presently-owned "GOCOs", --Government-Owned Contractor-Operated military industrial facilities- - many of which are on the National Priorities List,<sup>3</sup> representing billions of dollars in expended and projected cleanup costs.

Congress was not, however, nearly as simple, forthright, or definite in its articulation of CERCLA as was Rev. Fulghum in his life-mimicking-kindergarten annunciation. Regrettably, the certainty of its statute of limitations ("SOL") provisions for the reimbursement<sup>4</sup> of environmental cleanup costs is one of the many sacrifices CERCLA laid on the altar of clarity.<sup>5</sup> SOL issues become

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<sup>3</sup> "[T]he President shall list as part of [the National Contingency Plan] national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually." 42 U.S.C. §9605(a)(8)(B) (1982).

<sup>4</sup> The use of the word "reimbursement" is my perhaps less-than-adequate, albeit deliberate, attempt to employ generic verbiage in order to avoid variations of the words "recovery" and "contribution" which are terms of art (to the extent CERCLA can be viewed as such), as will be developed in Sections VII & VIII.

<sup>5</sup> "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history. [Citations omitted.] The statute was passed hastily by Congress as compromise legislation after very limited debate under a suspension of the rules." *United States v. Mottolla*, 605 F. Supp. 898, 902 (D. N.H. 1985).



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exponentially more complex when environmental response costs are incurred “voluntarily” --in the absence of some specific legal obligation to do so. Yet, with surprising frequency, DOD agencies have stepped up to the plate and voluntarily initiated expensive environmental cleanup programs at GOCOs all across the country. That is why this effort will explore the SOL issues facing DOD agencies seeking reimbursement for GOCO-related voluntarily initiated environmental response costs. As will be examined in Section VII, one circuit has held that there is no federal cause of action to recoup costs for such voluntary cleanups unless the plaintiff is the recipient of an abatement order or embroiled in litigation. Under that holding, CERCLA SOLs are not even an issue since the court decided that state-based claims for contribution are the only available remedy for such plaintiffs. On the other hand, as will be discussed in much greater detail in Section VIII, the SOL for reimbursement actions in the other circuits can range from as short a period as three years to there being no time-bar whatsoever. Of course, this all depends on the jurisdiction and the circumstances under which environmental response actions were undertaken.

Before addressing the brain-numbing labyrinth of GOCO-related SOL issues, it will be beneficial to understand what GOCOs are, how they evolved, and how, as a creature of contract, indemnification comes into play. Furthermore, from a policy perspective, it will also be helpful to examine if GOCO DOD-agency-owners should, and if they should, how they should, seek environmental response cost reimbursement from their contractor-operators.

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Not unlike the assembling a jigsaw puzzle, before the CERCLA SOL picture can fully emerge, all of these historical, contractual, and policy pieces of the puzzle must first be laid on the table. It is only then that we will examine how DOD agencies and their GOCO contractors can share the costs of putting the environment back the way they found it by cleaning up their own mess.

**Everything You Always Wanted To Know About Statute Of  
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*"But what a cruel thing is war;  
to separate and destroy families and friends,  
and mar the purest joys and happiness God has granted us in this world;  
to fill our hearts with hatred instead of love for our neighbors,  
and to devastate the fair face of this beautiful world!"<sup>6</sup>*

**SECTION II**

**WHAT IS A GOCO, AND WHERE DID THEY COME FROM**

General Robert E. Lee's lamentation that part of war's cruelty is its inherent tendency "to devastate the fair face of this beautiful world" is no less valid today than it was 140 years ago. If anything, due to technological advancements since the American Civil War, the long-term effects of war's environmental devastation has increased exponentially. Historically, there has been a significant lag time between the development and utilization of technology capable of destroying the environment and the technology necessary to realize and reverse such destruction. As in the case of GOCOs, however, not all of earth's war-related devastation takes place on the battlefield. Generally speaking, but for the Hawaiian and Aleutian Islands, the United States was spared what is usually thought of as the geophysical effects of the Second World War. Unfortunately, World War II-era GOCOs emerged just as everyone was so distracted by waging

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<sup>6</sup> Excerpt from a letter from General Robert E. Lee, to his wife, the former Mary Ann Custis (great-granddaughter of Martha Washington), shortly after his overwhelming victory in the 1862 Battle of Fredricksburg. ROBERT E. LEE, JR., RECOLLECTIONS AND LETTERS OF GENERAL ROBERT E. LEE 89, (Garden City Publishing Co. 1904).

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warfare on a global scale that they failed to realize they were poisoning the planet in the process. Consequently, long after the bombed-out cities of Japan and Europe have been rebuilt, the United States is still reaping the harvest of the seeds of environmental ignorance sown during the war at GOCOs scattered across the country.

But what, exactly, is a GOCO? Its seemingly self-prescribed government-owned-contractor-operated definition is not entirely intuitive. Furthermore, the reduction of this centaur-like --half-government/half-private sector-- creature to a four-letter acronym is a deceptive oversimplification and does a grave disservice to the significant role it has played in American, and by extension, world history. Arguably, but for the Sagittarian release of GOCOs' arrows upon the Axis powers, the course, if not the outcome, of World War II would have been vastly different.

Arsenal of Democracy: The United States did not enter World War II with the "lone superpower" status it enjoys today. On the contrary:

At the outset of World War II, the notion that the United States would be the arsenal of democracy for munitions production was, at best, wishful thinking. During the 1930's, small arms ammunition manufacturing for the Department of War was conducted solely at Franklin Arsenal. While a number of commercial firms in the United States manufactured sporting ammunition, no peacetime market existed for incendiary, tracer, or armor-piercing ammunition; therefore, civilian industry lacked even a basic understanding of how to mass-produce these military staples. Moreover, deterioration of stockpiles from World War I production and shipments to Great Britain had depleted total reserves of small arms munitions ... .

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The situation for larger caliber munitions was even more distressing. ... As Secretary of War Stinson was to remark in 1943, "We didn't have enough powder [for large caliber munitions in 1940] in the whole United States to last the men we now have overseas for anything like a day's fighting." ...

The cure to this highly unsatisfactory situation was the creation of a GOCO munitions industry.<sup>7</sup> [Alteration in original. Footnote citations omitted.]

GOCOs were the incubus of the mechanism by which the United States became what President Franklin Roosevelt would eventually refer to as "the arsenal of democracy."<sup>8</sup> Rather than reinventing the wheel, the military decided to join forces with the private sector rather than trying to duplicate the sector's efforts in areas in which it already clearly excelled, such as mass production and the labor management skills associated therewith. This was noted by the Supreme Court in a labor law case regarding some of the first GOCO employees:

Congress charged the War and Navy Departments with the operation of about 100 giant Government-owned munition plants. Those Departments had the option of operating them themselves or through commercial contractors. So as to utilize fully the labor and management resources of the nation and to minimize encroachment upon its industrial structure, both Departments chose the latter course.

....  
[W]e find these [GOCO] contracts a reflection of the fundamental policy of the government to refrain, as much as possible, from doing its own manufacturing and to use, as much as

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<sup>7</sup> Mark J. Connor, Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability, 131 Mil. L. Rev. 1, 4 (1991). Though well beyond the level of detail necessary to establish the rudimentary understanding of GOCOs required here, Connor provides an excellent historical account of U.S. Army GOCOs.

<sup>8</sup> FDR's Fireside Chats 170-172 (Russell D. Buhite & David W. Levy eds., 1992).

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possible (in the production of munitions), the experience in mass production and genius for organization that had made American industry outstanding in the world. The essence of this policy called for private, rather than public, operation of war production plants.

....

It would have been simple for the Government to have ordered all this production to be done under governmental operation as well as under governmental ownership. To do so, however, might have weakened our system of free enterprise. We relied upon that system as the foundation of general industrial supremacy upon which ultimate victory [during World War II] might depend. In this light, the government deliberately sought to insure private operation of its new munitions plants.<sup>9</sup>

As effective as it turned out to be, one would think that GOCOs would have evolved long before the 1940s, but such was not the case. To catch a glimpse of just how unprecedented this relationship between governed and government was, one need look no further than the Eighth Circuit decision from which the above-cited case was appealed:

[The authority granted by the National Defense Act of July 2, 1940] were extraordinary powers. The scheme, which is involved in the present situation, of producing munitions in government owned plants, 'through the agency of selected qualified commercial manufacturers,' on the basis of a fixed fee for carrying on the operations, with title to both the materials used in [sic] the products manufactured resting at all times in the United States, was admittedly *a novel and revolutionary set-up in the field of American industrial life*. The 'Statement of Labor Policy,' issued June 22, 1942, ... characterized it in this language: 'These plants embody a new and tripartite relationship among Government, labor, and management.'<sup>10</sup> [Emphasis added.]

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<sup>9</sup> Powell v. United States Cartridge Co., 339 U.S. 497, 499 n2, 506, 507 (1950).

<sup>10</sup> United States Cartridge Co. v. Powell, 174 F.2d 718, 726-727 (8th Cir. 1949).

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Learning As We GOCO: In many respects, however, the seeds of GOCOs' World War II industrial mobilization successes were in fact sown earlier, in the fertile soil of World War I-era industrial mobilization shortcomings. Though the scope of this effort does not merit such treatment, Randall J. Bunn thoroughly explores the history of World War I government contracting with civilian munitions manufacturers, the lessons learned therefrom, and how they were applied to our industrial mobilization efforts during World War II.<sup>11</sup> Bunn contends that the three most significant World War I-era influences on World War II-era industrial mobilization were an overarching plan and authority for mobilization, the utilization of cost-plus-fixed-fee contracts, and more equitable post-war contract termination settlement procedures.<sup>12</sup> Clearly, with the passage of the National Defense Act of 1916,<sup>13</sup> Congress paved the way for President Woodrow Wilson to set in motion a plan for wartime industrial mobilization on a scale unprecedented prior to Congress' declaration of war the following April. With the subsequent creation of the War Industries Board in July 1917, which President Wilson made directly answerable to himself eight months later, Congress provided a mechanism to "furnish needed assistance to the

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<sup>11</sup> Randall James Bunn, Contractor Recovery for Current Environmental Cleanup Costs Under World War II-era Government Contract Indemnification Clauses, (unpublished LL.M. thesis, The George Washington University Law School) (on file with The George Washington University Law School Library). Although Bunn's thesis was published with relatively insignificant changes in 41 A.F. L. Rev. 163 (1997), regrettably, some of the references I have made do not appear in the law review version, and that is why I have cited the unpublished thesis and not the published article.

<sup>12</sup> Bunn, *supra* note 11 at 44-50.

<sup>13</sup> Ch. 134 §120, 39 Stat. 213 (1916).

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Departments engaged in making war purchases.”<sup>14</sup> “The WIB [War Industries Board] became one of the most ambitious attempts to organize and control American industry in the history of the United States. ... Patterned after the WIB, the War Production Board created in 1942 played a central role in the War mobilization effort during World War II.”<sup>15</sup> Although there were GOCOs before its creation, it was the War Production Board and the policy and planning behind it that launched the “novel and revolutionary set-up in the field of American industrial life.”<sup>16</sup>

Easy Come, Easy GOCO: All World War II-era GOCOs and their foreseeable progeny, as creatures of contract, were birthed of the same parents; a facility contract and a production contract (or as was almost always the case, more than one production contract).<sup>17</sup> At the risk of oversimplifying matters, there were two basic types of facilities contracts, with a combination of the two constituting a hybrid facilities contract.<sup>18</sup> The first type of facilities contract

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<sup>14</sup> Bunn, *supra* note 11 at 45 n170, referencing ROBERT D. CUFF, THE WAR INDUSTRIES BOARD: BUSINESS-GOVERNMENT RELATIONS DURING WORLD WAR I, at 1-2, 109 (1973).

<sup>15</sup> Bunn, *supra* note 11 at 46.

<sup>16</sup> Bunn contends that the evolution of cost-plus-fixed-fee contract and the passage of the Vinson-Trammel Act in 1934 which limited the profits therefrom, helped set the stage for World War II's GOCO revolution. See Bunn, *supra* note 11 at 46-47.

<sup>17</sup> Connor, *supra* note 7 at 9.

<sup>18</sup> Connor notes that the Federal Acquisition Regulation, which antedates the GOCO-subject matter of this effort, now recognizes three types of facilities contracts: facilities acquisition contracts, facilities use contracts, and consolidated facilities contracts. See Connor, *supra* note 7 at 9.



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addressed the situation in which the government arranged to have built from scratch a previously nonexistent facility. The second type anticipated the government contracting with a manufacturer for the use of a pre-existing facility. For the last twenty years or so, however, GOCOs have been making the transition from contract law to real estate law with the various forms of facilities contracts being replaced with real property leases.

The production contract serves as Uncle Sam's shopping list, the mechanism by which the government contracts for specific goods and the terms under which the contractor will manufacture them. Unlike facilities contracts that had significant similarities among those executed during the same time period, production contracts varied greatly from contract to contract, depending on the war-item needed. Especially during the war when the demands of the military were constantly changing, it was not uncommon for the same facility to be manufacturing several war-items under different production contracts at the same time.<sup>19</sup> Hypothetically speaking, it could have often been a case of *gear today, gun tomorrow*.

Facilities Within a Facility: Perhaps because of the variety of production contracts, and their corresponding variety of raw materials and manufacturing processes, many GOCOs have more than one area of contamination. Section 101(9)'s broad definition of "facility" encompasses areas as geographically large

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<sup>19</sup> Connor, *supra* note 7 at 9.

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as an "installation," and items as relatively small as a "pipe," "pit," or piece of "equipment."<sup>20</sup> As the United States District Court for the Southern District of Georgia lamented, "CERCLA is singularly unhelpful in determining what constitutes a 'site' or 'facility'. By its very definition, a facility can be a storage container or an entire landfill."<sup>21</sup> Consequently, it is entirely possible and often probable for there to be numerous *facilities within a facility*. Like Churchill's "riddle wrapped in a mystery inside an enigma,"<sup>22</sup> this adds exponentially to the complexity of environmental response cost reimbursement analysis. This is because it is not at all uncommon for a single GOCO facility to comprise many, perhaps even many *hundreds*, of acres, on which there could be dozens of facility-qualifying wells, buildings, structures, ponds, pits, lagoons, deposition sites, and the like. Though the implications of this will be revisited in Section IX, they are nevertheless introduced in this section because an understanding of GOCO issues would be incomplete without realizing that a single GOCO can entail numerous cleanup sites.

This begs the question, *How should a multiple-site facility be treated SOL-wise?* Imagine how staggeringly complex things become in regard to SOLs when response cost issues arise from a single GOCO with a dozen or more cleanup sites, each of whose response have been initiated and completed at

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<sup>20</sup> CERCLA §101(9), 42 U.S.C. §9601(9) (1994).

<sup>21</sup> Union Carbide Corp. v. Thiokol Corp., 890 F. Supp. 1035, 1043 (S.D. Ga. 1994).

<sup>22</sup> "I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma." Sir Winston Spencer Churchill, in an October 1, 1939, radio address.

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different times over the course of several years. Is the analysis performed at the individual cleanup site level? How about at the level of an "operable unit," in which the cleanup activities of more than one site are grouped together due to their similarities in order to facilitate the cleanup? Should the SOL analysis be conducted at the entire Facility-with-a-capital-F GOCO level rather than at the facility-with-a-lower-case-f cleanup site level?

The simple answer is, the courts have discretion in determining how to, or even whether to, divide a facility into component parts for SOL purposes. So, whether it is individual sites, operable units, or even facilities-as-a-whole, it is entirely up to the courts' discretion. On the one hand, even though courts have been hesitant to treat each "barrel" as a separate facility (although they could under §101(9) if a hazardous substance was "deposited, stored, or disposed of" therein), they have been inclined to apply different statutes of limitations to separate operable units at large, complex, sites.<sup>23</sup> Of course not all facilities, GOCO or otherwise, are conducive to being arranged into operable units. If the respective cleanup sites are geographically distinct, the nature and degree of contamination varies, and the required response actions differ, an operable unit-division determination is unlikely. In such cases it may be best to treat each site as a separate facility for SOL purposes.

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<sup>23</sup> See Union Carbide, *supra* note 21 at 1043, determining that solid waste management units should be considered separate facilities from a landfill located on the same site in that they were geographically distinct, the wastes were vastly different, and that different removal and remedial actions would probably be required.

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On the other hand, in circumstances under which a facility has been treated as a single, undivided project area on the NPL, or all the facility's response activities were undertaken to address a single matter, e.g., ground water contamination, then it may be more appropriate to treat the facility as a whole for purposes of SOL analysis. This seems to be the approach the Hyampom court would take in light of its observation that:

There is no authority for the view that each "remedial" activity undertaken at a site triggers a new cause of action for the cost recovery of that activity. Courts construing [§113(g)(2)(A)], the statute of limitations which governs cost recovery actions for "removal" activities, have uniformly held that all "removal" activities at a site constitute a single "removal" for statute of limitations purposes.<sup>24</sup>

Therefore, perhaps the best SOL strategy is to calculate at what organizational level making the SOL determination would best meet your need and then try to convince the court that your argument is superior to that of your distinguished colleague across the courtroom who is arguing the exact opposite. From a plaintiff's perspective, this would entail buying as much time as possible which in all likelihood would mean the larger the component, the more time it would take to either initiate or complete the environmental response action. Thus, clearly, size matters.

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<sup>24</sup> State of California v. Hyampom Lumber Co., 903 F. Supp. 1389, 1394 (E.D. Cal. 1995).

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SUMMARY: Having learned much from the experiences of World War I, GOCOs emerged as part of the industrial mobilization needed to equip, not just the Americans, but the Allies as well, during World War II, having a dramatic impact on the war. A product of the mutual assent of the government and the governed, their relationships were dictated by the facilities and production contracts under which they were created. Though certainly different from the shell-scarred islands of the south Pacific, or the bomb-cratered battlefields of western Europe, the environmental contamination resulting from war-related production at so many World War II-era GOCOs on American soil inadvertently served to further "devastate the fair face of this beautiful world."

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*And [the Samaritan] went to [the injured man attacked by thieves]  
and bound up his wounds, ... and brought him to an inn ... . And on the morrow  
when he departed, he took out two pence, and gave them to the host, and said  
unto him, "Take care of him; and whatsoever thou  
spendest more, when I come again, I will repay thee."*<sup>25</sup>

SECTION III

INDEMNIFICATION:

SHARING THE EXPENSE, NOT SHIFTING THE LIABILITY

Notwithstanding their common parentage, the wide spectrum of GOCOs can be as diverse as children born into the same family, even among the seemingly contractual equivalent of fraternal or identical twins. One way GOCOs differ even among those with the same basic type of facilities and production contracts is in the language used in their various risk allocation provisions, the concept of which I will refer to for purposes of this effort simply as *indemnification*.<sup>26</sup> The Good Samaritan's willingness to indemnify the robbery victim of the victim's debt to the innkeeper was not so much a shifting of the victim's liability to the Samaritan as much as it was evidence of the Samaritan's desire to share or

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<sup>25</sup> *Luke 10:34-35* (King James).

<sup>26</sup> Although the universe of risk allocation would certainly include indemnification, hold harmless, release, and "as is" type provisions, it appears that most if not all the of the early GOCO contracts used language intended to indemnify, meaning "pertain[ing] to liability for loss shifted from one person held legally responsible to another," BLACK'S LAW DICTIONARY 692 (5th ed. 1979). Thus, though there are differences in these forms of risk allocation, for purposes of this effort, I intend to employ the more simple

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assume the expense of that liability. So it is under CERCLA. "From its inception, the GOCO concept has provided a tradeoff for munitions plant contractor-operators. In return for a lower level of profit than otherwise might be expected, the contractors received virtual immunity from risks resulting from munitions manufacturing operations."<sup>27</sup> This section will examine the extent of this purported risk immunity.<sup>28</sup>

Virtual Immunity, How Far Does It Go: In ascertaining the value of this "virtual immunity" at least three questions must be answered: Generally speaking, are these indemnification provisions enforceable under CERCLA in light of its "notably obscure" treatment thereof? Even if generally CERCLA-enforceable, do the specific indemnification provisions cover environmental response costs? And even if enforceable and deemed to cover CERCLA response costs, what, if any, defenses or obstacles are there to the actual enforcement of such risk allocation provisions?

*Enforceability:* In regard to enforceability, as is often the case, CERCLA seems to create as many problems as it solves. One example of this is evident in the apparent double-speak of CERCLA §107(e)(1):

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term "indemnification" as a shorthand for the universal risk allocation concept, notwithstanding the fact that CERCLA sternly frowns on indemnification's dictionary-definition notion of shifting liability.

<sup>27</sup> Connor, *supra* note 7 at 6.

<sup>28</sup> For much of this information, and so much more, I am deeply indebted to Mr. Frank Steele, a civilian attorney with the Environmental Law Directorate of the Air Force Materiel Command Law Office,

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No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from one owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this section shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.<sup>29</sup>

Notwithstanding the fact that the second sentence appears to allow for risk-allocation provisions that the first sentence appears to prohibit, the Seventh Circuit has done as good a job as any in attempting to explain the apparent contradiction:

The subsection [CERCLA §107(e)(1)] taken as a whole is notably obscure, but we agree with every other appellate court that has been called upon to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability. (citations omitted.) The first sentence speaks of "transfer[ing] ... liability, that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting."<sup>30</sup>

Because CERCLA liability is strict, joint and several, and retroactive, §107(e)(1), does not permit a liable party under §107(a) to *transfer* or *shift* this liability to another. Section 107(e)(1), expressly allows, however, for a liable party to pass along or *share the expense of that liability* with another. Under CERCLA, shifting liability is prohibited, while assuming the expense of said

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headquartered at Wright-Patterson AFB, OH, who graciously returned my many telephone calls and email messages.

<sup>29</sup> 7 U.S.C. §9607(e)(1).

<sup>30</sup> Harley-Davidson, Inc. v. Minstar, Inc. 41 F.3d 341, 342-343 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1401(1995). *See also* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir 1986).



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liability is permitted, as a matter of contract law, subject to the indemnification provisions of the governing facility and production contracts. In other words, the respective indemnification clauses of a GOCO's facilities or production contracts may provide a mechanism to *share the expense of the liability*, while *not transferring the liability* itself.

*Coverage:* Of course, the scope of the particular facility/production contract clause must also encompass CERCLA environmental response costs in order for the indemnification to be enforced. As Connor observed:

Both facilities and production contracts contain standard clauses affecting the scope of a contractor's liability for operating the facility. For the most part the financial protection to the contractors provided under these standard contractual clauses does not extend to the costs of complying with federal and state environmental laws and regulations. Instead, these clauses are directed towards dealing with the issue of liability for torts, environmental and otherwise, with respect to third persons. To the extent that any of these clauses provide financial protection to the contractor, they are conditioned on the contractor not engaging in willful misconduct nor demonstrating a lack of good faith. (footnote omitted).<sup>31</sup>

While these indemnification clauses may have been standard, they are not, however, uniform. Neither are they always conveniently located within the contracts under the boldfaced, all-cap, subdivision heading INDEMNIFICATION, but must often be exhumed from within provisions covering government-owned property, insurance, allowable costs, and even within the definitions of such terms as "claim" and "loss".

*Barriers:* Although a detailed analysis of facility and production contracts indemnification clauses for World War II GOCOs is well beyond the limited

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<sup>31</sup> Connor, *supra* note 7 at 9.

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scope of this effort, Bunn, in his exhaustive treatment of the topic, articulates three “barriers” to recovery under such indemnification clauses:<sup>32</sup> 1) the Anti-Deficiency Act<sup>33</sup> and its fiscal law prohibition against obligating funds in the absence of a Congressional appropriation;<sup>34</sup> 2) the difficult burden of proving that decades-old post-termination costs are “incident to and necessary” under the contract, and thus reimbursable;<sup>35</sup> and, 3) , the release provisions of the respective settlement agreements entered into pursuant to the Contract Settlement Act of 1944,<sup>36</sup> in the absence of express environmental-cleanup-cost exceptions thereto.<sup>37</sup>

Upon first glance, it might appear that another barrier to recovering under an indemnification theory might be the relative antiquity of some of the subject provisions. Specifically, the contracts in which the indemnification clauses of World War II-era GOCOs are embedded were all executed long before CERCLA was even a twinkle in Uncle Sam’s eye. This fact alone, however, does not

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<sup>32</sup> See generally, Bunn, *supra* note 11 Section IV at 127.

<sup>33</sup> 31 U.S.C. §1341.

<sup>34</sup> Bunn, *supra* note 11 at 128-141. Mr. Bunn was proven prophetic in a very recent (June 28, 2002) case, in which the United States Court of Federal Claims noted that, “[The Comptroller General’s Office has] never objected to indemnity where the maximum amount of liability is fixed or readily ascertainable,” before deciding that in the provision before it “GSA’s obligations under [the subject indemnification clause] appear so open-ended as to contravene the Anti-Deficiency Act.” *Union Pacific Railroad Corp. v. the United States*, 2002 WL 1455808, 4 (Fed. Cl.).

<sup>35</sup> Bunn, *supra* note 11 at 142-146.

<sup>36</sup> 41 U.S.C. §101-125.

<sup>37</sup> Bunn, *supra* note 11 at 147-149.

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determine whether the indemnification provisions cover CERCLA environmental response costs. This matter is succinctly addressed by the United States District Court for the District of Connecticut.

[C]ontract provisions allocating CERCLA-type liabilities are nonetheless enforceable when those contracts have been entered into prior to the enactment of CERCLA. The test is not whether the parties specifically referred to CERCLA in the Agreement, but rather, whether the text of the Agreement conveys an intention of the parties to allocate CERCLA-type environmental liability.<sup>38</sup>  
[Citations omitted.]

Intent of the Parties: Thus, divining the "intentions of the parties" in regard to indemnification clauses, even those executed decades earlier, is no more dicey than construing the parties' intent in a more contemporary contract. In doing so, the courts have deemed that the parties intended to "allocate CERCLA-type environmental liability" when either the indemnification provision clearly addresses environmental liability (which usually only comes into play for more recent contracts), or when the indemnification provision is so broad as to encompass any and all liabilities. For instance, in one case the court found that the contract in question did not cover CERCLA liability costs, because its language limited coverage to a specific set of risks, none of which were environmental.<sup>39</sup> In another case, however, cited in the above-mentioned

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<sup>38</sup> Armotek Industries, Inc. v. Freedman, 790 F. Supp. 383, 391 (D. Conn. 1992).

<sup>39</sup> Purolator Product Corp. v. Allied Signal, Inc., 772 F. Supp. 124, 130 (W.D. N.Y. 1991), *citing* Mobay Corp. v. Allied Signal, Inc., 761 F. Supp. 345, 357-358 (D. N.J. 1991).

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decision, the court found that a release covering all claims "arising out of or in any way relating to" the contact, did cover CERCLA liability costs.<sup>40</sup>

Ascertaining the intentions of the parties became that much easier, however, during the 1970s, 1980s, and 1990s. As alluded to previously, GOCOs play an important role in America both in terms of national and economic security. DOD needs industry's expertise, and industry needs DOD's business. The lingering uncertainty of looming environmental response costs, however, was making industry increasingly hesitant to play in DOD's sandbox. Nevertheless, as testimony to the efficacy of the defense-industry lobby, contractors found much of the legal predictability and judicial certainty they sought with the passage of the National Defense-Contracts Act (PL 85-804),<sup>41</sup> which states in pertinent part that:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government to enter into contracts or into amendments of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modifications of contracts, whenever he deems that such action would facilitate the national defense.<sup>42</sup>

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<sup>40</sup> Purolator, *supra* note 39 at 132, *citing* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986).

<sup>41</sup> 50 U.S.C. §1431-1435.

<sup>42</sup> 50 U.S.C. §1431.

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As Connor notes, "PL 85-804 never actually mentions indemnity. Legislative history, however, makes it clear that indemnification is one of the major reasons for the enactment of the legislation."<sup>43</sup> Without going into near the detail he provides, Connor concludes his thorough treatment of the topic by explaining, "In sum, PL85-804 has proven to be a valuable tool for apportioning some types of environmental liability the Army or its operating contractors reasonably might expect to incur. It is not, however, a cure-all."<sup>44</sup>

SUMMARY: Therefore, since indemnification is merely a mechanism for sharing the expense of environmental liability and not shifting the liability itself, the courts have determined that such provisions, though executed prior to CERCLA, are fully enforceable, provided the parties intended for the provision to cover such environmental harm.

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<sup>43</sup> Connor, *supra* note 7 at 36.

<sup>44</sup> Connor, *supra* note 7 at 42.

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*Thus conscience does make cowards of us all;  
And thus the native hue of resolution  
Is sicklied o'er with the pale cast of thought,  
And enterprises of great pith and moment  
And lose the name of action.*<sup>45</sup>

SECTION IV

TO SEEK, OR NOT TO SEEK

REIMBURSEMENT: THAT IS THE QUESTION

In the interest of time and economy, and perhaps even as a matter of *conscience*, some have questioned, even if legally possible, whether it is "the right thing to do" for the government to seek reimbursement from a GOCO partner. Not unlike using pecuniary sanctions to enforce household rules between husband and wife in a single-income family, should government agencies seek environmental response cost reimbursement from contractors with whom they, figuratively speaking, share the same bed and bank account? By way of this section, I contend that DOD's pursuit of fair and reasonable reimbursement from its GOCO partners is not only "the right thing to do," but it is the only fiscally sound, legally correct, and politically expedient course to take. To do otherwise would be to allow *the native hue of resolution* to be *sicklied o'er*

<sup>45</sup>

WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1.

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*with the pale cast of thought.* DOD cannot afford the luxury of such conscious-induced cowardice and in so doing, *lose the name of action.*

Underhanded Overhead: Under current Federal Acquisition Regulation ("FAR")<sup>46</sup> and Defense Contract Audit Agency ("DCAA")<sup>47</sup> guidelines, in the absence of contractor wrongdoing or lack of due care,<sup>48</sup> environmental costs may be charged against overhead, provided the costs are "reasonable and allocable" to the contract. This is because:

Environmental costs are normal costs of doing business and are generally allowable costs if reasonable and allocable.<sup>49</sup>

...  
The costs incurred to clean up environmental contamination are considered to be normal business expenses.<sup>50</sup>

Normal business expenses are those expenses that an ordinary, reasonable, prudent businessperson would incur in the

<sup>46</sup> Federal Acquisition Regulation, 48 C.F.R. §§1-53. See FAR subsections 31.201. Determining allowability; 31.201-3, Determining reasonableness; and 31.201-4, Determining allocability.

<sup>47</sup> Defense Contract Audit Agency Manual 76401.1; Defense Contract Audit Agency Contract Audit Manual ¶7-2120 -- Environmental Costs.

<sup>48</sup> 10 U.S.C. §2324, "Allowable costs under defense contracts: (a) Indirect cost that violates a FAR cost principle.--The head of an agency shall require that a covered contract provide that if the contractor submits to the agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and **if that cost violates a cost principle in the Federal Acquisition Regulation or applicable agency supplement to the Federal Acquisition Regulation, the cost shall be disallowed.** ... (e) Specific costs not allowable.--(1)The following costs are not allowable under a covered contract: ... (D)**Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local or foreign laws and regulations,** except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable provisions of the Federal Acquisition Regulation ... (O)**Cost incurred by a contractor in connection with any criminal, civil, or administrative proceeding** commenced by the United States or a State, to the extent provided in subsection (k) [Proceeding costs not allowable.]. (Emphasis added.)

<sup>49</sup> DCAA CAM, *supra* note 47 at ¶7-2120.1 -- Summary.

<sup>50</sup> DCAA CAM, *supra* note 47 at ¶7-2120.3 -- Cost Principles Applicable to Environmental Costs.

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course of conducting a competitive for-profit enterprise. ... To be allowable, costs must also be reasonable in amount, allocable to government contracts, and not be specifically unallowable under government cost principle provisions.<sup>51</sup>

...  
The environmental laws usually require each Potentially Responsible Party (PRP) for contamination at a site to be individually liable for the complete clean-up of the site. The allowable environmental cost should only include the contractor's share of the clean-up costs based on the actual percentage of the contamination attributable to the contractor.<sup>52</sup>

The basic reasoning behind the line of thought not to pursue environmental cleanup reimbursement is that contractors would then charge such environmental-cleanup-related overhead costs to their other government contracts. This has some in the DOD acquisition community crying foul because they see these environmental-responses-costs-masquerading-as-overhead being paid with their precious procurement funds rather than funds earmarked for environmental cleanup. Their environmental brethren more or less take the *you can complain because roses have thorns or be grateful because thorn bushes have roses* approach with their acquisition counterparts, quickly pointing out that environmental cleanup dollars have been giving acquisition a free ride for the past 20 years or so by subsidizing what rightfully should have been procurement cost all along.

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<sup>51</sup> DCAA CAM, *supra* note 47 at ¶7-2120.4 -- Normal Business Expense.

<sup>52</sup> DCAA CAM, *supra* note 47 at ¶7-2120.9 -- Potentially Responsible Party (PRP) for Environmental Clean-Up.



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Back to the Future Cleanup Costs: Reluctantly conceding that present cleanup costs are perhaps legitimate business expenses, it is the issue of DOD pursuing reimbursement for environmental sins of the past which contractors would then pay for via future contracts, that is the most problematic. This after-the-fact paying of the environmental-cleanup piper by way of allocating significantly higher overhead-type costs to contractors' future government contracts is perhaps the most pressing argument for not seeking reimbursement for GOCO-related environmental response costs. It is, nevertheless, clear that such legitimate environmental costs include past remedial costs as well as present preventative costs:

Environmental costs include costs to prevent environmental contamination, costs to clean up **prior contamination**, and costs directly associated with the first two categories, including, legal costs. ...<sup>53</sup>

...  
The key concept for reasonableness of environmental costs (both preventive and **remedial**) is that the methods employed and the magnitude of the costs incurred must be consistent with the actions expected of an ordinary, reasonable, prudent businessperson performing non-government contracts in a competitive marketplace. ...<sup>54</sup>

Costs incurred to prevent environmental contamination will generally be allocated as an indirect expense using a causal or beneficial base. Costs to clean up **environmental contamination caused in prior years will generally be period costs allocated through a company's G&A** [General and Administrative] **expense pool.**<sup>55</sup> [Emphasis added.]

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<sup>53</sup> DCAA CAM, *supra* note 47 at ¶7-2120.2 -- Types of Environmental Cost.

<sup>54</sup> DCAA CAM, *supra* note 47 at ¶7-2120.5 -- Reasonableness of Environmental Costs.

<sup>55</sup> DCAA CAM, *supra* note 47 at ¶7-2120.6 -- Allocability of Environmental Costs.

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Righting Contractor Wrongdoing: Unwilling (at least not without a fight) to risk future acquisition cost increases due to the present recoupment of past environmental response costs, another line of defense bandied about has been the well-worn "contractor wrongdoing" argument:

If environmental clean-up efforts resulted from contamination caused by contractor wrongdoing, the clean-up costs are not allowable."<sup>56</sup>

...

If environmental clean-up costs are the result of contractor violation of laws, regulations, orders or permits, or disregard of warnings for potential contamination, the cleanup costs including any associated costs, such as legal costs, would be unreasonable and thus unallowable.

At first glance this would appear to be the axiomatic *have your cake and eat it too* solution to the problem of being reimbursed for past environmental cleanups at the expense of future procurements. The rationale goes something like: If GOCO environmental contamination is the result of contractor wrongdoing, then the cost thereof is unreasonable; and if unreasonable then the costs are unallowable under the contract, and if unallowable, then the costs cannot be allocated as G&A/overhead expenses; and if not allocable then the costs cannot be absorbed by future government contracts; thus, the environmental community can pursue reimbursement without the acquisition community having to pay for it. Thus, for want of a nail the war is won.<sup>57</sup> But

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<sup>56</sup> DCAA CAM, *supra* note 47 at ¶7-2120.1 -- Summary. See, 10 U.S.C. §2324, "Allowable costs under defense contracts, *supra* note 48.

<sup>57</sup> My most sincere apologies to poet George Herbert. (1593-1633).

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not so fast. There may be more, or as the case may be, less, to contractor wrongdoing than first meets the eye:

Fines or penalties are expressly unallowable ... . However, the incurrence of clean-up costs to correct environmental contamination is **not a penalty; it is a legal obligation.**

Most environmental laws do not require the contractor to be guilty of a violation to enforce contractor payment for clean-up costs. Therefor, it is rare for government agencies to bring criminal, or even administrative, charges for contamination.

...  
The contractor should not be denied recovery of clean-up costs, if it complied with the laws, regulations, and permits **in effect at the time of the contamination.**<sup>58</sup> [Emphasis added.]

The “laws, regulations, and permits in effect at the time of the contamination” of most World War II-era GOCOs were substantially different than they are now. That explains the rarity of “government agencies [bringing] criminal, or even administrative charges” against those GOCO contractors. The fact of the matter is, most of the environmental damage done at these GOCOs, especially that capable of incurring CERCLA liability, was inflicted back before we even thought it was stupid, much less criminal, to do such things. Therefore, if DOD seeks reimbursement for its environmental response costs from GOCO partners, the contractors have every right to charge the costs to their other contracts --some of which, no doubt, will be with the government-- consistent with their accounting systems and cost principles governing those contracts.

<sup>58</sup>

DCAA CAM, *supra* note 47 at ¶7-2120.13 -- Environmental Wrongdoing.

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The Color of Money: So as to avoid the perceived robbing of Procurement Peter to pay Enviro Paul, in desperation some will counter, "If the government is going to end up paying for it anyway, why not avoid the specter of litigation, pay for environmental cleanup with environmental cleanup money, forgo reimbursement, and be done with it?" Perhaps this would be an acceptable proposition if this was nothing more than a bookkeeping what-color-money-should-it-be issue, but it is not. Whether a DOD agency pays for its GOCO-contractor's cleanup costs directly with environment-colored money without seeking reimbursement, or if it gets reimbursed by the contractor and ends up paying for the cleanup costs indirectly with procurement-colored money, it is still that agency's funds. Thus, at the agency level, the total cost would be the same with no net total-cost difference. This is true even if all the costs reimbursed to that agency were eventually passed through and paid for with the agency's procurement funds by way of contractors' increased overhead.

Another argument is that, since the government, i.e., DOD is to some degree a polluter at these various GOCOs, and since CERCLA is a polluter pays statute, it is in fact only appropriate to pay for environmental response costs with environmental rather than procurement dollars. Nevertheless, to some extent contractor cleanup costs, which would otherwise increase contractor G&A expenses and be paid for with procurement funds, can be offset with environmental cleanup funds by an amount commensurate with the degree to which a court deems DOD to have been a polluter. As will be discussed in much

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greater detail in Section VIII, this determination is made pursuant to §113(f)'s equitable factors the courts are to use in allocating response costs among PRPs.<sup>59</sup>

Government Subsidy v. Free-Market Forces: While it is clearly not just an accounting matter, the more complex policy and legal issues surrounding the pursuit of environmental response costs must be taken into consideration as well. Where the above-mentioned husband-and-wife-single-family-income analogy breaks down is that GOCOs are not necessarily matches made in heaven. On the contrary, in some respects they may be more akin to the common-law union of incestuous lovers cohabiting in the nether world of contract law, of which perhaps only Dante could appreciate. Bound not by love, but by the forces of a capitalistic, free-market economy, GOCO contractors should be treated accordingly.

To forgo a fair share contribution from a GOCO contractor would be to exempt the contractor from normal business incentives, disincentives and forces. To remain competitive, companies must keep their overhead as low as possible. Either a company must recover its environmental costs from its sales, or alternatively, deduct it from profit thus reducing earnings, and in turn reducing the attractiveness of its stock. In either event, it pays a price in its competitiveness if it fails to control cleanup costs. This is an economic reality across our free economy. To exempt a GOCO contractor from this competitive, economic reality would be to give it an economic windfall or advantage vis-à-vis other competitors, and insulate it from normal market forces. I am not aware of any compelling reasons that militate in favor of isolating a GOCO

<sup>59</sup>

CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1) (1994).

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contractor and its customers, from competitive, economic realities.<sup>60</sup>

Government subsidy of the environmental cleanup costs of some contractors which is otherwise unavailable to others, risks undermining the economic soundness of, and the corresponding confidence in, the entire procurement process. It also unfairly burdens those non-governmental contractors who must pay for their own messes and therefore cannot compete with their counterparts who are riding the government gravy train.

Sharing the Costs With Others: To some degree, there is a silver lining to this *the sky is falling* concern of some within procurement circles in that things may not be as bad as they fear nor as dire as they assert. For instance, if a DOD-agency-owner assumes GOCO environmental response costs and does not pursue reimbursement from the contractor-operator, the agency pays exclusively for such costs. On the other hand, even if the contractor-operator reimburses the DOD-agency-owner only to charge back the costs as overhead on subsequent contracts, many, if not most of these contracts are likely to be with an other-than-the-owner DOD agency, non-DOD, non-government, and even foreign customers.<sup>61</sup> Thus, by contractors passing along their

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<sup>60</sup> Lieutenant Colonel Marc W. Trost is the former Restoration Branch Chief for the Environmental Law Division of the Air Force Legal Services Agency located in Arlington, VA. Though presently serving at the Pentagon as an Assistant General Counsel in the Secretary of the Air Force General Counsel's Office, the opinions herein extracted from a May 15, 2002 interview, were made in Lieutenant Colonel Trost's personal capacity, and do not necessarily reflect the views of the Department of the Air Force.

<sup>61</sup> Trost, *supra* note 60.

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environmental cleanup costs by way of overhead across all its contracts, any particular DOD-agency-owner certainly ends up spending less than it would by paying for all response costs up front and neglecting to pursue reimbursement.

Congressional Intent: Upon further examination, the whole issue of reimbursement is also more than just a policy question, but it is in fact, a legal question as well. For a DOD agency not to pursue reimbursement from its GOCO contractors, would be not only economically incorrect, but would be inconsistent with what Congress intended when it enacted CERCLA. After all, one of CERCLA's primary objectives is to ensure that parties responsible for contamination pay their appropriate, equitable share of environmental response costs.

Congressional intent was further demonstrated when it amended the Defense Environmental Restoration Program ("DERP")<sup>62</sup> by authorizing a transfer account, the Defense Environmental Restoration Account ("DERA").<sup>63</sup> Generally speaking, crediting receipts back to a specific appropriation is prohibited in that such proceeds should be deposited into the miscellaneous receipts account in the United States Treasury so as to avoid the unauthorized augmentation of a Congressional appropriation. There are, however, two exceptions to this general prohibition. The first entails a refund --money paid by

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<sup>62</sup> SARA §211, 10 U.S.C. §§2701-2708.

<sup>63</sup> 10 U.S.C. §2703.

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an appropriation to an entity that was not rightfully entitled thereto, which upon its return can be credited back to the appropriation. DERP, however, falls within the second exception, which requires specific statutory authority before an appropriation can receive and retain funds. As explained by Paul M. Barzler in his thorough treatment of the topic, "Using DERA as the principle account, the three military departments and the Defense Logistic Agency (DLA) operate separate installation restoration programs and the Office of the Secretary of Defense provides policy oversight and controls the actual disbursement of DERA funds into the established accounts of the individual DOD components."<sup>64</sup> DERP also authorizes the Army, Navy, Air Force, and DLA to credit environmental response cost reimbursements directly back to DERA,<sup>65</sup> which is a clear indication of Congress' intent to provide an incentive for the services and DLA to actively seek such reimbursement.

Of course, even if a DOD-agency-owner was inclined not to pursue reimbursement from its GOCO contractor-operator, the Department of Justice must concur in any decision to settle or compromise environmental cost recovery claims. As if that were not bad enough, if the costs are more than a half-million dollars (which most are), the head of the agency would have to secure the written approval of the United States Attorney General prior to the unasserted

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<sup>64</sup> Paul McDonald Barzler, Cost Recovery for CERCLA Response Actions at DOD Facilities 31 (1994) (unpublished LL.M. thesis, The George Washington University Law School) (on file with The George Washington University Law School Library).

<sup>65</sup> 10 U.S.C. §2703(d).



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claim being compromised.<sup>66</sup> When contemplating the compromise of a legitimate environmental cleanup claim, this elevated level of accountability, reminiscent of the childhood pastime *Mother May I* is yet another clear indication of Congress' intent to discourage such compromise.

SUMMARY: Therefore, in order to maintain the equilibrium of market forces within the defense contracting community, to not thwart CERCLA's responsible-party-pays principle, to conduct DERP in a manner consistent with the fund-replenishment purposes for which DERA was created, and to avoid possible inter-agency compromise/settlement political goat ropes, it is imperative that GOCO DOD-agency-owners (and all federal government agency-owners) aggressively pursue fair and reasonable reimbursement from their GOCO contractor-operators.

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<sup>66</sup> CERCLA §122(h)(1), 42 U.S.C. §9622(h)(1) (1994).

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*"The problem is all inside your head," she said to me.  
"The answer is easy if you take it logically.  
I'd like to help you in your struggle to be free,  
There must be fifty ways to leave your lover."<sup>67</sup>*

**SECTION V**

**A RECIPE FOR**

**REIMBURSEMENT: YOU DON'T NEED TO BE COY, ROY**

While DOD's pursuit of reimbursement of environmental response costs from a GOCO lover may have a chilling effect on their ongoing relationship at all tryst locations and not just the facility in question, it is in fact relatively easy to do -- if you take it logically. This is because CERCLA liability is strict, joint and several, as well as retroactive.<sup>68</sup> This section addresses the elements of establishing a *prima facie* case for, and the defenses available in opposition to, asserting a cause of action for the reimbursement of environmental response costs.

*Prima Facie* Requirements - Don't Make a New Plan, Stan: First, contrary to the emphatic assertion of Mr. Simon's would-be seductress, there is but one way --not fifty-- to establish a *prima facie* case and thereby pursue

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<sup>67</sup> Paul Simon, *Fifty Ways to Leave Your Lover*, on Still Crazy After All These Years (Warner Brothers Records 1975).

<sup>68</sup> United States v. Olin Corp., 107 F.3d 1506, 1511-1514 (11th Cir. 1997).

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reimbursement, and a would-be plaintiff need not reinvent the wheel. To prevail, the out-of-pocket party must prove that:<sup>69</sup>

1. The party(s) from whom it seeks reimbursement is within one of the four categories of PRPs enumerated in §107(a),<sup>70</sup> which includes past and present owners and operators;
2. The location of the "mess" is a facility as defined in §101(9),<sup>71</sup> which includes any building, structure, installation, site or area where a hazardous substance has been "deposited, stored, disposed of, or placed, or otherwise come to be located";
3. There is a §107(a)<sup>72</sup> release or threatened release of hazardous substances at the facility;
4. The out-of-pocket party incurred costs responding to the release or threatened release; and
5. The costs and response actions conform to the National Contingency Plan ("NCP"), as described in §105.<sup>73</sup>

As alluded to above, the establishment of such a *prima facie* case is often, for the most part, not difficult due to the inherent nature of a GOCO relationship.<sup>74</sup> By definition, a GOCO, "a government-owned contractor-operated military industrial *facility*," meets the first two criteria concerning what constitutes

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<sup>69</sup> B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2nd Cir. 1996).

<sup>70</sup> CERCLA §107(a), 42 U.S.C. §9607(a) (1994). The four §107(a), classes of liable persons includes, past and present owners and operators of a facility that accepted hazardous substances, "arrangers," i.e., generators of hazardous substances, and transporters of hazardous substances under certain conditions.

<sup>71</sup> CERCLA §101(9), 42 U.S.C. §9601(9) (1994).

<sup>72</sup> CERCLA §107(a), 42 U.S.C. §9607(a) (1994).

<sup>73</sup> CERCLA §105, 42 U.S.C. §9605 (1994).

<sup>74</sup> Actually it recently got more difficult. Last August the United States Court of Appeals for the Fifth Circuit added what amounts to another item to the laundry list of prerequisites for asserting joint liability and pursuing reimbursement. Aviall Services Inc. v. Cooper Industries, Inc., 263 F.3d 134 (5th Cir. 2001), which held that a PRP seeking for contribution must also be the subject of a §106 abatement order or §107(a) litigation, is discussed in excruciating detail in Section VI.

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both a PRP and a facility. Furthermore, due to SARA's inclusion of §120, *Federal facilities*:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section [§107] of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections [106] and [107] of this title.<sup>75</sup>

The NCP sets standards for responding to the release or threat of release of hazardous substances and ensures that response actions undertaken are cost effective. As such, a defendant can only meet its burden of proving that a response cost is too expensive to be consistent with the NCP by establishing that the plaintiff's decision to incur such costs were arbitrary and capricious.<sup>76</sup> Now that sovereign immunity has been waived, once a release or threatened release is determined, the DOD-owner of the GOCO must not only incur costs responding thereto, but must do so in compliance with the NCP in coordination with the appropriate regulatory authorities.<sup>77</sup> Of course, in doing so, the DOD-agency owner establishes the last two elements of a *prima facie* case as well.

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<sup>75</sup> CERCLA §120(a)(1), 42 U.S.C. §9620(a)(1) (1994).

<sup>76</sup> See *United States v. American Cyanamid Co.*, 786 F. Supp. 152, 161 (D. R.I. 1992); *United States v. Hardage*, 982 F. 2d 1436, 1442 (10th Cir. 1992), cert. denied 510 U.S. 913 (1992); and *J.V. Peters & Co., Inc. v. Administrator EPA*, 767 F. 2d 263 266 (6th Cir. 1985).

<sup>77</sup> CERCLA §107(a)(4)(A), 42 U.S.C. §9607(a)(4)(A) (1994).

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Defenses - How to Slip Out the Back, Jack: Even though §120(a)(1) also makes it clear that DOD's imposition of liability as an owner in no way absolves contractors of their joint liability as an operator, contractor-operators can, nevertheless, avail themselves of affirmative defenses. As was alluded to earlier and as will be discussed in greater detail later, there are now two CERCLA mechanisms for what have heretofore been referred to generically as "reimbursement" --recovery, pursuant to §107,<sup>78</sup> and contribution, pursuant to §113<sup>79</sup>-- both of which travel with their respective entourage of defenses.

*Recovery Defenses:* Aside from the statute of limitations, which will be addressed in Sections VII and VIII, CERCLA provides three primary affirmative defenses in regard to recovery:<sup>80</sup> 1) an act of God,<sup>81</sup> 2) an act of war,<sup>82</sup> and 3) an act or omission of a third party.<sup>83</sup>

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<sup>78</sup> CERCLA §107, 42 U.S.C. §9607 (1994).

<sup>79</sup> CERCLA §113, 42 U.S.C. §9613 (1994).

<sup>80</sup> Goodrich, *supra* note 69 at 514. Though there are other possible defenses, such as the §127, recycling arranger defense, and the §101(20)(E-G) secured creditor exemption, these clearly do not apply to GOCOs and do not merit discussion in light of this effort's limited scope. Perhaps closer to home is the §101(35)(A), innocent landowner defense. It is also unavailable, however, to either GOCO DOD-agency-owners or contractor-operators since it is limited to landowners who acquired the facility in question after the environmental harm occurred and who did not know, and had no reason to know of, such harm. *See* United States v. Shell Oil Co., 841 F. Supp. 962, 973-974 (C.D. Cal. 1993), *aff'd*, 281 F.3d 812 (9th Cir. Feb. 11, 2002), *vacated by* 2002 U.S. App. Lexis 12855 (9th Cir. Jun. 28, 2002), (applying §101(35) to the specific facts of the case).

<sup>81</sup> CERCLA §107(b)(1), 42 U.S.C. §9607(b)(1) (1994).

<sup>82</sup> CERCLA §107(b)(2), 42 U.S.C. §9607(b)(2) (1994).

<sup>83</sup> CERCLA §107(b)(3), 42 U.S.C. §9607(b)(3) (1994).

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Generally, the courts have narrowly construed these defenses so as to not unduly erode CERCLA's remedial purpose, such as when a California district court contrasted §107(a)'s broad scope of liability with §107(b)'s limited scope of defenses.<sup>84</sup> More specifically, they have placed great significance on the §107(b) requirement "that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused solely by* [its three enumerated defenses]."<sup>85</sup> (Emphasis added.) For example, the act of God defense is only available if a party can establish evidence of "an unanticipated grave natural disaster or natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight."<sup>86</sup> As to acts of war, even though all DOD GOCOs are in some way connected to war-related activities, the term "act of war" has not been construed to cover the government's war-related contracts.<sup>87</sup> Similarly, no GOCO-related party can avail itself of the third-party defense in that it "provides a defense to liability only where a totally unrelated

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<sup>84</sup> Pinhole Point Properties, Inc., v. Bethlehem Steel Corp., 596 F. Supp. 283, 286 (N.D. Cal. 1984).

<sup>85</sup> CERCLA §107(b), 42 U.S.C. §9607(b) (1994).

<sup>86</sup> See United States v. Alcan Aluminum Corp., 892 F. Supp. 648, 658 (M.D.Pa. 1995) (finding that heavy rainfall, even when spawned by a hurricane, is not the kind of exceptional natural phenomenon anticipated by the statute).

<sup>87</sup> See Shell, *supra* note 80, at 970-972 (finding, after lamenting the absence of a CERCLA "act of war" definition, and its nonexistent legislative history on the matter, that it "cannot reasonably be construed to cover either the government's wartime contracts to purchase aviation fuel from the oil companies or its regulation of the oil companies' production" thereof).

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third party [not a PRP's agent, employee, or a person with whom it has a contractual relationship] is the sole cause"<sup>88</sup> of the environmental harm.

As to traditional equitable defenses in response to §107 recovery actions, after discussing the adverse impact of the "unclean hands" defense, the United States District Court for the Western District of Washington stated, "In summary, the better reasoned decisions and majority of cases have held that the limited defenses of Section 107(b) are exclusive and that equitable defenses such as unclean hands cannot be asserted because of the clear statutory language and because they would thwart the public interest."<sup>89</sup>

*Contribution Defenses:* The second mechanism for reimbursement under CERCLA is "contribution," pursuant to §113(1). Though it is the rest of §113(f)(1) that has recently been receiving the most air-time (thanks in no small part to Aviall<sup>90</sup>), it is the next to the last sentence of this provision that addresses, albeit subtly, defenses. "In resolving contribution claims, the court may allocate response costs among liable parties using such **equitable factors** as the court determines are appropriate."<sup>91</sup> (Emphasis added.) As an equitable action,<sup>92</sup>

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<sup>88</sup> United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

<sup>89</sup> United States v. Western Processing Co., 734 F. Supp. 930, 939 (W.D. Wa. 1990).

<sup>90</sup> Aviall Services Inc. v. Cooper Industries, Inc., 263 F.3d 134 (5th Cir. 2001), will be examined at length in Section VI.

<sup>91</sup> CERCLA §113(f)(1), 42 U.S.C. §113(f)(1).

<sup>92</sup> BLACK'S is quick to remind us that an "equitable action" entails, "One seeking an equitable remedy or relief; though in the federal and most state courts, with the procedural merger of law and equity, there is but now *procedurally* only one type of action--a 'civil action.'" (BLACK'S LAW DICTIONARY 482 (5th ed. 1979)) which may lend credence as to why CERCLA §113 is titled *civil proceedings*.

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contribution is not at all constrained by the limited defenses of its §107 recovery cousin. As the United States District Court for the Northern District of Ohio noted less than a year ago, "There are no other defenses [other than the three enumerated in §107(b)] available to §107 defendants. On the contrary, Section 113 defendants may assert equitable defenses as courts are expressly permitted to allocate response costs among liable parties using such equitable factors as the courts determine appropriate."<sup>93</sup>

SUMMARY: Therefore, on the one hand, ascertaining a party's likelihood of success in seeking reimbursement GOCO-wise requires more than a casual *drop off the key Lee and get yourself free, hop on the bus Gus, don't need to discuss much* analysis. On the other hand, neither is the establishing a *prima facie* case, and being knowledgeable of the available defenses the legal equivalent of rocket science.

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United States v. Chrysler Corp., 157 F. Supp. 849, 855 (N.D. Ohio 2001).



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*So you're the little woman who  
wrote the book that made this great war.<sup>94</sup>*

SECTION VI

**AVIALL IS FAIR IN LOVE AND WAR**

I should have started earlier; had I written this paper a year ago, this section would have been unnecessary. Actually, when I first learned of Aviall Services Inc., v. Cooper Industries, Inc.,<sup>95</sup> I had hoped that the matter would have been fully resolved by now and that I could have relegated the entire Aviall episode to a footnote in Section V's discussion of requirements for a *prima facie* case of reimbursement. Be that as it may, last August the United States Court of Appeals for the Fifth Circuit added what amounts to another item to the laundry list of prerequisites for pursuing reimbursement as was discussed in the previous Section.<sup>96</sup> The decision, which, according to the dissent, "runs directly counter to

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<sup>94</sup> According to her, President Abraham Lincoln's greeting to Harriet Beecher Stowe, author of UNCLE TOM'S CABIN, as Lincoln "strode toward her with two outreached hands" upon her arrival at the White House. CARL SANDBURG, ABRAHAM LINCOLN, THE PRAIRIE YEARS & THE WAR YEARS, 385 (One-Volume Edition, Galahad Books 1993) (1954).

<sup>95</sup> Aviall, *supra* note 90.

<sup>96</sup> The dissent in Aviall refers to this *addition* as the majority "imposing [an] extra-congressional restriction" which it interjected by "boldly rewrit[ing] the statute." Aviall, *supra* note 90 at 146. Although the dissent is no less compelling than the majority, it is certainly more entertaining. While I cannot concur on every point, neither can I help but smile as Circuit Judge Wiener discusses "the majority's Orwellian insistence," and how it "fecklessly relies on House and Senate reports" and "cobbles together a hodgepodge of other district court cases," in support of its "Emperor's new clothes" opinion. As far as scathing dissents go, in my book, Wiener's a winner.

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CERCLA's goal of prompt cleanups ... and encourages PRPs to postpone, defer, or delay remediation,"<sup>97</sup> could very well be the CERCLA equivalent of *the little woman that started the next great environmental war*. This is because, according to the holding in Aviall, "a PRP seeking contribution from other PRPs under §113(f)(1) must have a pending or adjudged §106 administrative, or a §107(a) cost recovery action against it."<sup>98</sup> Furthermore, as will be discussed in greater detail in the following Section, of perhaps even greater significance to DOD GOCO owners is Aviall's erroneous recitation that "a PRP [government or otherwise] cannot file a [CERCLA] §107 [cost recovery] suit against another PRP."<sup>99</sup> But let's not get ahead of ourselves.

Aviall for One, and One for Aviall: On motion for summary judgment, the district court in Texas dismissed Aviall's CERCLA §113 claim for contribution. The Fifth Circuit's affirmation marked the first time a circuit court has denied a PRP's contribution claim simply because it failed to be engaged in either private-party litigation or an EPA enforcement action.<sup>100</sup> In simplest terms, Aviall bought three aircraft maintenance facilities from Cooper, discovered ground and groundwater contamination caused by both parties, and then spent ten years

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<sup>97</sup> Aviall, *supra* note 90 at 156.

<sup>98</sup> Aviall, *supra* note 90 at 145.

<sup>99</sup> Aviall, *supra* note 90 at 137.

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and millions of dollars cleaning it up before suing Cooper for reimbursement under CERCLA and Texas law. Much like GOCO DOD-agency-owners, Aviall began its massive cleanup efforts without the *benefit* of being embroiled in a §106 enforcement action or a §107(a) lawsuit. Instead, Aviall's cleanup was prompted by a state corrective action directive and through the state's voluntary cleanup program.

Ironically, both Aviall and the Fifth Circuit relied on §113's *plain language*, which, in light of their diametrically opposite conclusions, calls into question just how plain §113's language really is. Having apparently taken ambiguity lessons from its sister §107(e)(1) indemnification provision, §113(f)(1) states in pertinent part that:

**Any person may** seek contribution from any other person who is liable or potentially liable under [CERCLA §107(a)], during or following any civil action under [CERCLA §106] or under [CERCLA §107(a)]. ... **Nothing in this subsection shall** diminish the right of any person to bring an action for contribution in the absence of a civil action under [§106] or [§107].<sup>101</sup> [Emphasis added.]

Similarly, with both the majority and the dissent employing it, the legislative history appears to be of little help, other than quashing the pervasive rumor that Franz Kafka and Rube Goldberg co-authored the provision. As part

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<sup>100</sup> Aviall, *supra* note 90 at 141. The court concedes that, "No federal circuit has yet directly weighed in on this question ... ." Of course, everyone knows what they say about fools rushing in where angels fear to tread.

<sup>101</sup> CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1).

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of what the dissent referred to as interpretive sleight-of-hand,”<sup>102</sup> the majority construed the *plain meaning* of the word “may” in the first sentence as “shall” or “must,” rejecting Aviall’s contention that Congress would have said “may only” if it had meant “shall” or “must.”<sup>103</sup> Having done so, the court concluded that, “Accordingly, a party can file a contribution claim only if it has been alleged or deemed liable under §107(a) or if the federal government has ordered it to clean up contaminated sites under §106.”<sup>104</sup> Not to be outdone, the dissent decried the “unduly elevating of the phrase ‘during or following’ in §113(f)(1) to the pedestal of exclusivity” as a perversion of statutory construction.<sup>105</sup>

The court also disagreed with Aviall concerning the meaning of the last-sentence savings clause, “Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under” §106 or §107. Aviall argued that, consistent with *its* interpretation of “may” in §113(f)(1)’s first sentence, its last sentence demonstrated Congress’s intent to allow PRP contribution claims whether or not the PRP is the recipient of an abatement order or a private party in litigation.<sup>106</sup> The majority astutely noted that, “If we adopted Aviall’s interpretation, it would render superfluous [the court’s

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<sup>102</sup> Aviall, *supra* note 90 at 148.

<sup>103</sup> Aviall, *supra* note 90 at 138-139.

<sup>104</sup> Aviall, *supra* note 90 at 139.

<sup>105</sup> Aviall, *supra* note 90 at 145.

<sup>106</sup> Aviall, *supra* note 90 at 139.

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construction of] the first sentence of §113(f)(1),”<sup>107</sup> which was, I surmise, precisely Aviall’s point. Not unlike its “shall/must” interpretation of “may” in §113(f)(1)’s first sentence, it would appear the court would have the word “nothing” in §113(f)(1)’s last sentence mean “everything but,” preferring the savings clause read, “*Everything but state-law derived contribution claims* shall diminish the right of any person to bring an action for contribution in the absence of a civil action under §106 or §107.” Nevertheless, in what the dissent charged as “yet another judicial trespass on the legislative turf,”<sup>108</sup> the court opined that the last-sentence “savings clause was likely intended to preserve state-based claims of contribution.”<sup>109</sup> Of course, nowhere in §113(f)(1) are state-based *anythings* ever expressly mentioned. Assuming for the sake of argument that the court is on the right track, perhaps an interpretation more faithful to its own rationale would be that the savings clause preserves a PRP’s entitlement to whatever contribution rights, if any, the PRP enjoyed prior to §113(f)’s enactment. While this interpretation would certainly include any available state-based contribution rights, it would not necessarily limit a PRP’s rights to them.<sup>110</sup>

Finally, in desperation, Aviall launched a last-ditch policy argument that “the district court’s ruling would discourage voluntary cleanups because parties

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<sup>107</sup> Aviall, *supra* note 90 at 139.

<sup>108</sup> Aviall, *supra* note 90 at 146.

<sup>109</sup> Aviall, *supra* note 90 at 140.

<sup>110</sup> See Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994); and United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96, 100-101 (1st Cir. 1994).

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would not be able to seek contribution unless they were actually sued or faced EPA administrative orders." The court nevertheless insisted that it "believes that [its] interpretation of the statute is wholly consistent with the policy goals of CERCLA," but only after disclaiming that "the text [of §113(f)(1)] trumps policy preferences, and that we cannot substitute Congress' wishes with our own."<sup>111</sup> In response, the dissent was astonished that the majority believed its decision "furthers rather than frustrates" CERCLA's policy goals, which the Fifth Circuit itself had previously identified as "facilitating the prompt cleanup of hazardous waste sites and ... shifting the cost of environmental response from the taxpayers to the parties who benefited from the wastes that caused the harm."<sup>112</sup>

Aviall is Well That Ends Well: Even before all of the hubbub over the controversial case had subsided, Aviall, convinced of the rightness of its cause and perhaps sensing a division within the court, petitioned the Fifth Circuit for a rehearing *en banc*. Consequently, it was no big surprise to many of those familiar with the case that Aviall's petition was granted in December 2001.

What did surprise some, however, was that the Department of Justice declined to file an *amicus curie* brief with the court prior to its granting of Aviall's rehearing petition. "Industry groups and EPA officials had urged DOJ to express

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<sup>111</sup> Aviall, *supra* note 90 at 144.

<sup>112</sup> Aviall, *supra* note 90 at 155, *quoting* OHM Remediation Services v. Evans Cooperage Co., Inc., 116 F.3d 1574, 1578 (5th Cir. 1997).

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support for the voluntary settlement program, but the department had refused to do so.”<sup>113</sup> Perhaps taking a cue from Aviall concerning its dealings with the court in regard to volunteerism, it almost appears as if DOJ was reluctant to help clean up the Fifth Circuit’s legal landscape without the equivalent of a §106 order requiring it to do so. And that, to the surprise of many, is exactly what DOJ got. In what has been characterized as “an unprecedented step,” in May 2002, the Fifth Circuit ordered DOJ to file an *amicus* brief in anticipation of the as-yet-unscheduled *en banc* hearing.<sup>114</sup> In that *amicus curie* literally means “friend of the court,”<sup>115</sup> the Fifth Circuit’s take on friendship is a bit troubling: “Be our friend, DOJ, and if you won’t, we’ll order you to befriend us!”<sup>116</sup>

SUMMARY: The entire Aviall quagmire, culminating in the Fifth Circuit’s unprecedented order to DOJ, is not at all unlike a three-legged stool with one leg shorter than the other two. Congress’ failure to shoulder its share of the governmental load by allowing CERCLA to become the poster-child of legislative ambiguity, has created a power struggle and strained the relationship between judicial and executive branch legs of the government stool. Form that

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<sup>113</sup> Appeals Court Orders DOJ to Take Stance in Superfund Cost Case, [www.OutsideEPA.com](http://www.OutsideEPA.com), June 7, 2002, p.11.

<sup>114</sup> *InsideEPA*, *supra* note 108.

<sup>115</sup> BLACK’S LAW DICTIONARY 75 (5th ed. 1979).

<sup>116</sup> A “friendship” like that may cause some speculation as to whether the brief to which DOJ eventually gives birth will have been the result of a private, noncommercial act between mutually consenting parties, or not.

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perspective, Aviall could indeed be "the little woman who wrote the book that started this great war."



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*Outside of a dog, a book is man's best friend.  
Inside of a dog, it's too dark to read.<sup>117</sup>*

**SECTION VII**

**§107(a) RECOVERY: DOD'S BEST FRIEND**

The objective of this section is to explain why, outside of not having to pay for environmental cleanup costs at all, a §107(a) recovery action is a GOCO DOD-agency-owner's best friend. As previously described, there are two CERCLA mechanisms by which one party may seek to recoup previous expenditures of environmental response costs from another party, "recovery" and "contribution." Because some courts view "recovery" and "contribution" as mutually exclusive, some view them as overlapping, and others conclude that "contribution" is but a subset of "recovery," I have generically and collectively referred to these kissing cousins as "reimbursement" to the extent that I could. Not unlike putting off talking about sex with your kids for as long as possible, up to this point, I have attempted to avoid these terms of art and their accompanying baggage to the extent they were avoidable. It is, nevertheless, time for us to begin *our little talk*, during which we will discuss in great detail the *birds and bees* of these two concepts. For this effort's purposes, the significance of these two

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<sup>117</sup>

Attributed to bushy eye-browed entertainer Julius "Groucho" Marx, 1895-1977.

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environmental-response-cost-reimbursement mechanisms is that §113(g), provides a different statute of limitations provision for each of these recoupment methods. In the next section, contribution, pursuant to §113(f)(1), will be addressed. This section, however, examines cost recovery pursuant to §107(a), by exploring who can (and who cannot) recover from whom, what can be recovered, and when whatever is recoverable can be recovered.

Who Can and Who Cannot Recover: The statute, the legislative history, and the case law are clear as to who, and perhaps equally important, who cannot, assert strict, joint and strict liability in a cost recovery action under §107(a).

*The Statute:* Recovery traces its roots to the original CERCLA legislation of 1980, which provides in §107(a), that:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) - (4) [Any of the four categories of "covered persons" with respect to a qualifying facility or site, i.e., PRPs] from which there is a release or a threatened release which causes the incurrence of [qualifying] response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe ...;

(B) any other necessary costs of response incurred by any other person ... .

...

The amounts *recoverable* in an action under this section shall include interest on the amounts *recoverable* under subparagraphs (A) through (D).<sup>118</sup> [Emphasis added.]

<sup>118</sup>

CERCLA §107(a), 42 U.S.C. §9607(a) (1994).

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Clearly, there are two broad categories to whom PRPs are liable for the expense of environmental cleanup, 1) governmental entities (the United States Government, a State or an Indian tribe, pursuant to §107(a)(4)(A); and 2) any other person (meaning any entity other than a PRP, i.e., an “innocent” party) pursuant to §107(a)(4)(B).

*Government Entities:* When the United States, e.g., DOD or EPA, steps in to cleanup a site, such as a GOCO, for example, it does so wearing its “Government-Entity Hat” in recognition of its responsibility to carry out “CERCLA’s broad, remedial purpose [which] is to facilitate the prompt cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefited from the wastes that caused the harm.”<sup>119</sup> (Citations omitted.) Of course, in a GOCO situation, the taxpayers, and thus the United States, is one of the “parties who benefited from the wastes that caused the harm,” at which time the United States must then don its “PRP Hat” and participate in the §113(f)(1) contribution process just like any other PRP.

*The Legislative History:* CERCLA’s legislative history clearly demonstrates how mistaken Aviall is, as well as Congress’ intention that the United States is entitled to pursue joint and several liability whether or not it is also a PRP. Although the 1980 original-recipe CERCLA contained no private-party contribution ingredients, its 1986 reformulation via SARA made CERCLA

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<sup>119</sup> OHM Remediation Services v. Evans Cooperage Co., Inc., 116 F.3d 1574, 1578 (5th Cir. 1997).

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considerably more palatable. To ensure that PRPs other than the federal government, states and tribes could seek contribution among themselves, the 1986 amendments gave us §113(f), but the legislative history makes it clear, however, that §113(f) was never intend to diminish the federal government's §107(a) entitlements:

This section [113] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the clean-up or costs that may be greater than its equitable share under the circumstances. *This section does not affect the right of the United States to maintain a cause of action under Section 107, or injunctive relief under Section 106, whether or not the U.S. was an owner or operator of a facility or a generator of waste at the site.*<sup>120</sup> [Emphasis added.]

The United States, like an actor, is capable of, and is often obligated to, play vastly divergent roles. Under §107(a)(4)(A) the United States plays the role the environmental enforcer who must protect the public weal. Under §113(f)(1) the United States must, with equal resolve, play the role of the PRP who must pay for its past conduct. It is in Congress screen-writing these vastly different roles for the United States that the legislative history demonstrates its intent to maintain the economic equilibrium between the government and the governed in facilitating the prompt cleanup of hazardous waste sites.

*The Case Law:* Nevertheless, it is not just the statute, or even the statute's legislative history, but it is the courts as well that have held that private

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<sup>120</sup> H.R. Report No. 99-253, pt. 1 at 79-80 (1985), reprinted in 1986 U.S.C.C.A.N. 2861-2862.

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parties may be jointly and severally liable to the United States pursuant to §107, notwithstanding the government's PRP-status. Though there are many circuit courts of appeal cases holding the oft repeated, *Section 107 is for innocent parties only. We don't serve your kind!*, they are distinguishable in that they pertain to actions between private parties and not §107(a)(4)(A) governmental entities --"the United States Government or a State or an Indian tribe."<sup>121</sup> At least one such private-party circuit court of appeals case made this point, when it stated that:

A government entity (Federal, State or Indian) or a party who did not contribute to the waste may recover all its expenditures in a traditional §107(a) "cost recovery" action against any PRP. Liability will be strict, joint and several. A PRP who contributed to the waste may recover from other PRPs a portion of the costs it expended in cleaning up the site in a contribution action under §113(f).<sup>122</sup>

Just last year, after referring to this same passage in Sun, the United States District Court for the District of Colorado stated:

The Tenth Circuit then proceeded to draw a distinction between the government and those parties who are *not* PRPs but have expended recovery costs, on the one hand, and PRPs on the other. I read the "or" contained in [the Sun extract above] to be disjunctive, and I read the word "party" to be the sole antecedent of "who," thus allowing two separate classes to recover their

<sup>121</sup> See *United Technologies v. Browning-Ferris Industries*, 33 F. 3d 96 (1st. Cir. 1994); *Bedford Affiliates v. Stills*, 156 F. 3d 416 (2nd Cir. 1998); *New Castle County v. Halliburton NUS*, 111 F. 3d 1116 (3rd Cir. 1997); *Pneumo Abex v. High Point Thomasville & Denton*, 142 F. 3d 769 (4th Cir. 1998); *Aviall Services, Inc. v. Cooper Industries Inc.*, 263 F. 3d 134 (5th Cir. 2001), the "inspiration" behind this rant; *Centerior Services Co. v. Acme Scrap Iron & Metal*, 153 F. 3d 344 (6th Cir. 1998); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F. 3d 761 (7th Cir. 1994); *Pinal Creek Group v. Newmont Milling Corp.*, 118 F. 3d 1298 (9th Cir. 1997); *United States v. Colorado & Eastern Railroad Co.*, 50 F. 3d 1530 (10th Cir. 1995); and *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F. 3d 1489 (11th Cir. 1996).

<sup>122</sup> *Sun Co. v. Browning-Ferris, Inc.*, 124 F. 3d 1187, 1193 (10th Cir. 1997).

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expenditure in a section 107(a) "cost recovery" action: (1) a government entity, which includes any Federal, State or Indian government; or (2) a private entity that did not contribute to the waste at issue.<sup>123</sup>

Similarly, there are numerous other district court decisions holding that the United States can assert its authority pursuant to §107(a)(4)(A) and seek to have private parties held jointly and severally liable, notwithstanding the fact that it may later be a §107(a)(1)-(4)-PRP. Perhaps one of the earliest such cases was decided in 1990,<sup>124</sup> only about four years after SARA, where the court held that:

The fact that the United States is a former site operator of the Western Processing site does not bar a finding of liability against the defendants nor bar recovery in this action. At a future proceeding in the contribution and counterclaim action ... the United States may be found liable as a former site operator and responsible for some portion of response costs incurred at the site.<sup>125</sup>

The following year, after a comprehensive examination of the matter, the United States District Court for the District of New Jersey held that, "The Government's potential liability for contribution does not affect this section 107(a) response cost recovery action. The Government's potential liability alters neither

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<sup>123</sup> United States v. Friedland, 152 F. Supp. 2d 1234, 1248 (D. Colo. 2001).

<sup>124</sup> There is at least one earlier circuit §107 strict liability decision, *United States v. Monsanto Co.*, 858 F. 2d 160 (4th Cir. 1988). It, however, is not as "clean" as the Western Processing decision, *supra* note 89, because, as the court noted in *United States v. Hunter*: "Some of the third party generators in that action were federal agencies; however, these agencies settled with the EPA prior to the civil action and therefore the question of whether the United States could proceed against private defendants on a theory of joint and several liability when government agencies were also PRPs was not addressed by the Forth Circuit." *United States v. Hunter*, 70 F. Supp. 2d 1100, 1104, n. 6 (C.D. Cal. 1999).

<sup>125</sup> Western Processing, *supra* note 89 at 939-940.

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the type of affirmative defenses permissible under section 107(a), nor the Government's right to full recovery of its response costs."<sup>126</sup> Since then several other district courts have had similar holdings,<sup>127</sup> of which one of the most notable is United Sates v. Hunter, where the court concluded:

[T]he court is persuaded that the government should be able to impose joint and several liability upon private PRPs, even when government agencies are themselves PRPs.

... As a final note, the Court recognizes that this finding relies upon an understanding of the United States government's unique role: through the EPA it is responsible for enforcing CERCLA and recovering response costs to protect the public fisc. At the same time, there are governmental agencies who are themselves PRPs. If the government were a private party in this same situation, it would only be able to avail itself of a claim for contribution. However, the government's role in the enforcement of CERCLA is greater than that of a mere private party. Allowing the government to impose joint and several liability is in harmony with the overall policy aims of CERCLA.<sup>128</sup>

The most recent such case of which I am ware as of this time appears to be courtesy of the United States District Court for the Northern District of Ohio.<sup>129</sup> Last September the court decided a case involving a dump/salvage-yard-turned-national-park. Shortly after Congress authorized the Department of Interior to acquire the property it did so, but it wasn't long before hazardous substances

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<sup>126</sup> United States v. Kramer, 757 F. Supp. 397, 414 (D. N.J. 1991).

<sup>127</sup> See United States v. Wallace, 961 F. Supp. 969, 974-975 (N.D. Tex. 1996), United States v. Manzo, 2001 WL 980554, \*14-16, \*15 (D. N.J. Aug. 17, 2000), and United States v. Friedland, 152 F. Supp. 2d 1234, 1246-1249 (D. Colo. 2001).

<sup>128</sup> United States v. Hunter, 70 F. Supp. 2d 1100, 1108 (C.D. Cal. 1999).

<sup>129</sup> Chrysler, *supra* note 93.

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were discovered thereon. Consequently, EPA began the initial cleanup and the National Park Service ("NPS") finished it up. Nearly \$24 million later, the United States filed suit under §107(a) and §113(f) against the Chrysler Corporation and six other large companies, but by the time the decision was reached, Minnesota Mining and Manufacturing ("3M") was the only holdout not to have settled with the government. In a monumental effort to do the right thing and yet not upset the Sixth Circuit Court of Appeals' Centerior<sup>130</sup> apple cart, the court underwent a dizzying analysis before concluding:

This Court is not the first federal court to address the issue of whether federal, or governmental, PRPs are similarly limited to §113 actions. In fact, most courts that have addressed this exact issue have created exceptions<sup>131</sup> for federal or governmental, PRPs thereby permitting them to obtain full cost recovery under §107 despite their PRP status.

Those courts that distinguish between federal and private PRPs have done so based primarily on the legislative history of the SARA and a "public monies" rationale. ... This Court finds both arguments persuasive as applied to the facts of this case.

Had the EPA conducted all phases of the cleanup, the Court can assume that Defendant 3M would not dispute the EPA's ability to pursue an action to recover its costs under §107. The Court, however, is unwilling to develop a distinction between two federal agencies that conducted cleanup activities, and thereby limit the U.S.'s ability to recover response costs incurred, solely because one of the agencies obtained ownership of the Site pursuant to a Congressional mandate.<sup>132</sup> [Citations and an original footnote omitted. Footnote added.]

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<sup>130</sup> Centerior Services Co. v. ACME Scrap Iron & Metal Corp., 153 F. 3d 344 (6th Cir. 1998).

<sup>131</sup> I must respectfully disagree with the court's characterization that "most courts that have addressed this exact issue have *created exceptions* for federal or governmental PRPs." The courts to which the Ohio court refers have not "created exceptions." On the contrary, they have simply construed §107(a) so as to be faithful to the language of the statute and congressional intent.

<sup>132</sup> Chrysler, *supra* note 93 at 859-860.



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Surely NPS' Congressional mandate to acquire a junk yard to create a national park in order to preserve "natural values" was no less stringent than DOD's Congressional mandate to become the arsenal of democracy by creating GOCOs in order to ensure world peace?

Aviall Revisited: So what's the big deal about Aviall? Why the concern? As long as the United States', and thus DOD's §107(a)(4)(A)-status is preserved, Aviall has no impact on GOCO DOD-agency-owners' cost recovery claims since its holding is limited to §113(f)(1) contribution claims. Aviall's significance to this effort is that its holding, in conjunction with its erroneous *dicta* that ignores the United States "unique" §107(a)(4)(A)-status, hamstring the United States recoupment efforts. Under Aviall, to the extent that GOCO cleanups have been voluntarily initiated by DOD without being the subject of a §106 abatement order or §107(a) litigation, the federal government would have no recourse other than state-based contribution actions available to private parties. "However, the government's role in the enforcement of CERCLA is greater than that of a mere private party."<sup>133</sup>

The Aviall court appeared to have caught this distinction when it asserted that, "The §107(a) cost recovery provision permits **the government** or an "innocent" party to recoup cleanup costs from PRPs."<sup>134</sup> (Emphasis added.

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<sup>133</sup> Hunter, *supra* note 128 at 1108.

<sup>134</sup> Aviall, *supra* note 90 at 137.

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Quotation marks in original.) Regrettably it seems to lose it by the very next paragraph when it states, "Courts have elaborated on the distinction between a contribution action under §113(f)(1) and a cost recovery action under §107(a). A contribution claim involves actions between PRPs, while **a cost recovery suit is initiated by a non-responsible party** against a PRP. See, e.g., OHM, 116 F.3d at 1583."<sup>135</sup> (Emphasis added. Citation in original.) Au contraire! The court's proclamation is but a half-truth. While it reflects the import of §107(a)(4)(B) regarding innocent parties, it totally ignores the at-least-equally-significant §107(a)(4)(A) provision *regarding the United States Government or a State or an Indian tribe*.<sup>136</sup> To have stated it correctly, the court should have said, "A contribution claim involves actions between PRPs, while a cost recovery suit is initiated by **the United States Government or a State or an Indian tribe, or a non-responsible party.**"

Equally disturbing, however, is the court's citation of "OHM, 116 F.3d at 1583"<sup>137</sup> in support of its claim that, "A contribution claim involves actions between PRPs, while *a cost recovery suit is initiated by a non-responsible party* against a PRP." While OHM makes it clear that it holds that "CERCLA permits only PRPs to bring contribution actions under section 113(f),"<sup>138</sup> it certainly does

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<sup>135</sup> Aviall, *supra* note 90 at 137.

<sup>136</sup> See United States v. Northeastern Pharmaceutical and Chemical Co., 810 F.2d 276 733 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

<sup>137</sup> OHM, *supra* note 119.

<sup>138</sup> OHM, *supra* note 119 at 1582 & 1583.

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not hold that *a cost recovery suit is initiated by a non-responsible party against a PRP*, as Aviall would lead one to believe. The Fifth Circuit in OHM, was unequivocal in this regard: "We express no opinion"<sup>139</sup> on the separate question addressed by the United Technologies<sup>140</sup> court, whether a PRP may seek to hold other parties jointly and severally liable under section 107(a) for response cost."<sup>141</sup> (Footnotes added.) While there is a time and place for smoke and mirrors, I respectfully contend that a United States Circuit Court of Appeals decision is neither.

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<sup>139</sup> Although it expressed "no opinion," the Fifth Circuit in OHM seems to err on the opposite end of the who-can-recover-under-§107(a) spectrum. In Aviall, ignoring §107(a)(4)(A), it says that only "innocent" parties may seek recovery under §107(a). (Aviall, *supra* note 90 at 137.) Yet, in OHM, based upon its combined reading of §107(a)(4)(A) and §107(a)(4)(B), it appears willing to allow *everyone* to recover their cleanup costs: "The text of section 107 does not limit the class of plaintiffs who may recover response costs; ... ." (OHM, *supra* note 119 at 1579.)

In reaching such a conclusion, it obviously fell into the same trap in construing §107 as it warned against in construing §113(f): "The ambiguity in §113(f) rides on the proper interpretation of the word 'other.'" (OHM, *supra* note 119 at 1581.) In §107(a)(4)(B), the court obviously interprets the word "other" as used in the phrase "any other person" in reference to §107(a)(4)(A)'s *the United States Government or a State or an Indian tribe*, rather than its correct reference to §107(a)(1)-(4)'s PRPs. The court's misapplication of the word "other" causes it to reach the incorrect conclusion that, "Far from a limitation, the combination of these two clauses in section 107 evidence congressional intent that *anyone* is eligible to recover response costs." (Emphasis added.) (OHM, *supra* note 119 at 1579.)

Similarly, in chiding OHM for its interpretation of the word "other" in §113(f), the court observed, "Such a reading would effectively mean, 'Any person may seek contribution from any other person in the world, so long as the person from whom contribution is sought is liable or potentially liable ... .' Under such a reading, section 113(f) would essentially parrot section 107(a), allowing anyone to recover response costs from a PRP." (Internal quotation and ellipse in original. Emphasis added.) (OHM, *supra* note 119 at 1581.)

So there you have it. On the one hand, the Fifth Circuit in OHM construed §107(a) so as to allow anyone to recover response costs by jumbling §107(a)(4)(A) & (B). On the other hand, the Fifth Circuit in Aviall construed §107(a) so as to exclude everyone except innocent parties, including "the United States Government or a State or an Indian tribe," totally ignoring §107(a)(4)(A) altogether. Go figure? I suppose reasonable minds can differ, even within the same circuit court. And since both the Aviall and OHM opinions were those of Hon. Emilio M. Garza, they can obviously differ even within the same circuit court judge as well.

<sup>140</sup> Referring to United Technologies Corp. v. Browning-Ferris Industries, Inc., *supra* note 110.

<sup>141</sup> OHM, *supra* note 119 at 1582, n.1.

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After its misleading reference to OHM, the Aviall court continues by stating, erroneously, that, "Thus, a [non-governmental] PRP cannot file a §107(a) suit against another PRP; it must pursue a contribution action instead."<sup>142</sup> Once again, the court must have totally ignored §107(a)(4)(A), or it would have stated, "Thus, a PRP cannot file a §107(a) suit against another PRP, unless the filing-PRP is coincidentally *the United States Government or a State or an Indian tribe.*"

*Any Other Person:* Getting back to §107(a)(4)(B), it is important to note, and as all the cases above regarding §107(a)(4)(B) make clear, that in addition to the federal, state and tribal governments engaged in such response actions, recovery is also available to "any other person." The \$64,000 - or as is most often the case, the multimillion-dollar question- is: who is "any other person"? Persons *other than* whom? Unfortunately, as one might expect from a statute that "was passed hastily by Congress as compromise legislation after very limited debate under a suspension of the rules," CERCLA does not answer these --and as discussed earlier, many other-- questions, and its "indefinite, if not contradictory, legislative history" is of little help either.<sup>143</sup> The prevailing view among the circuits that have weighed in on it is that "any other person" refers to parties *other than* those enumerated in §107(a)(1)-(4), the four classes of PRPs. Thus the vast majority of the circuits have construed recovery actions to be

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<sup>142</sup> Aviall, *supra* note 90 at 137.

<sup>143</sup> Mottolla, *supra* note 5 at 902.

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limited to governments (federal, state, and tribal) and other *innocent* --non-PRP-- parties.<sup>144</sup>

The only other plausible explanation is to do as the Fifth Circuit in OHM and interpret *any other person* as a reference to the "the United States Government or a State or an Indian tribe."<sup>145</sup> Thus OHM would have you believe that §107(a)(4)(A) allows governmental plaintiffs to recover, and §107(a)(4)(B) allows any plaintiff other than governments to recover. As was belabored in footnote 139, such an interpretation extends the class of recoverable persons such that it "allow[s] anyone to recover response costs from a PRP."<sup>146</sup> Though I am certainly in no position to comment on the verbosity of others, surely if Congress had meant for *anyone* to be able to recover from a PRP, it would have used the single word "anyone," and thereby avoided the web of words that we now know as §107(a)(4)(A) & (B).

What is Recoverable: Section 107(a)(4)(A) provides that PRPs are liable for "all costs of removal or remedial action" incurred by the United States

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<sup>144</sup> See *Untied Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 98-100 (1st Cir. 1994); *New Castle City v. Halliburton NUS, Corp.* 111 F.3d 1116, 1122 (3rd Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301-1302 (9th Cir. 1997); *Rumpke, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1241 (7th Cir. 1997); *United States v. Colorado & Easter R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996).

<sup>145</sup> OHM, *supra* note 119.

<sup>146</sup> OHM, *supra* note 119 at 1581.

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Government or a State or an Indian tribe.<sup>147</sup> Of course, this begs the question, "What, if any, difference is there between a *removal action* and a *remedial action*?" Though CERCLA does not provide a definition of "removal action" *per se*, it does define "remove" or "removal" in pertinent part as:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under [§104(b), Investigations, monitoring, coordination, etc., by the President] and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.]<sup>148</sup> [First bracketed information added; second in original.]

Similarly (in that it, too, is about as lucid), CERCLA also provides a definition of "remedy" or "remedial action," which in pertinent part includes:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials,

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<sup>147</sup> CERCLA §107(a)(4)(A), 42 U.S.C. §9607(a)(4)(A) (1994).

<sup>148</sup> CERCLA §101(23), 42 U.S.C. §9601(23) (1994).

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recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.<sup>149</sup>

As might be expected, the courts have been unable to make much more sense of these definitions than I, and have concluded that they are “so broadly defined that a wide variety of activities and their associated costs fall within the category of ‘response costs’”.<sup>150</sup> Perhaps this is because, as the Fifth Circuit noted:

[T]hat confusion often results because the industry use of ‘remediation’ is not synonymous with CERCLA’s definition of “remedial.” Moreover, the CERCLA definitions are expansive enough that certain activities may well be covered by both. This is a question of law with some complexity. “Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed.”<sup>151</sup>

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<sup>149</sup> CERCLA §101(24), 42 U.S.C. §9601(24) (1994). In 1863 Abraham Lincoln dedicated the National Cemetery at Gettysburg in 272 words. Six score and nineteen years later, with nearly twice the words and but a fraction of the eloquence, we have yet to adequately to define what constitutes environmental response costs.

<sup>150</sup> See *Jones v. Inmount Corp.*, 584 F. Supp. 1425 (SD Ohio 1984), and *Maridan Corp., v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D Ariz. 1984).

<sup>151</sup> *Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F. 3d 917, 926 (5th Cir. 2000), *rehear. denied* 2001 U.S. App. LEXIS 849 (2001), *cert. denied* 2001 U.S. LEXIS 4985 (2001), quoting *Public Service Co. v. Gates Rubber Co.*, 175 F. 3 1177, 1182 (10th Cir. 1999).

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Consequently, the courts have more or less reached a general consensus that a removal action is a short-term temporary response to an immediate threat, and that a remedial action entails responses taken to reach a long-term, permanent solution.<sup>152</sup> Of course, even notions of short-term versus long-term, and temporary versus permanent can be highly subjective. This is clearly reflected by the vast amount of litigation devoted to trying to distinguish between these two types of response costs. Thus, some district courts have attempted to utilize

several factors [to] assist in the characterization of an action as 'removal' or 'remedial:'

- (1) proximity to disclosure of the final remedial design, which may occur prior to approval of the final remedial plan,
- (2) whether the [Remedial Investigation/Feasibility Study] monitoring and testing are ongoing at the time of the action,
- (3) whether the action falls within the statutory definition of "removal" (or "remedial") and
- (4) the action's role in the implementation of the permanent remedy.<sup>153</sup>

Thus the consensus appears to be that "response costs" are comprised of "costs of removal action" and "costs of remedial action." So whatever it is they entail, government entities can recover "all costs of removal or remedial action," and "any other person" can recover "any other necessary costs of response."

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<sup>152</sup> Fairchild Semiconductor Corp., v. United States, 76 F. Supp. 1553, 1555 (N.D. Cal. 1991).

<sup>153</sup> Advanced Micro Devices, Inc., v. National Semiconductor Corp., 38 F. Supp.2d 802, 812 (N.D. Cal. 1999.) See also State of California v. Hyampom Lumber Co., 903 F. Supp. 1389, 1391 (E.D. Cal. 1995).



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When are Response Costs Recoverable: Were things not already complex enough, the §113(g)(2) recovery statute of limitations has one provision for “removal actions” and another for “remedial actions.”<sup>154</sup> More specifically, §113(g)(2), *Actions for recovery of costs*, provides in pertinent part that:

An initial action for recovery of the costs referred to in section [107] of this title must be commenced --

(A) for a removal action, within 3 years after the completion of the removal action, ... and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.<sup>155</sup>

Therefore, defining removal and remedial actions is just the beginning. Once that is done, the really tricky part for SOL purposes is determining what constitutes a removal action’s “completion,” and a remedial action’s “initiation of physical on-site construction,” since these are the two §113(g) triggering events.

*No Removal-Stops-Remediation-Begins Bright-Line Test:* Since the triggering event SOL-wise for removal is its *completion*, and the SOL triggering event for remediation is its *initiation*, one might be tempted to conclude that the two categories of recoverable response costs are mutually exclusive. Thus some have proposed a that a line of demarcation of sorts can be drawn such that on one side removal ends and on the other side remediation begins. The issuance of a site’s Record of Decision (“ROD”), a document outlining the final

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<sup>154</sup> CERCLA §113(g)(2), 42 U.S.C. §9613(g)(2) (1994).

<sup>155</sup> CERCLA §113(g)(2), 42 U.S.C. §9613(g)(2) (1994).

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cleanup program selected for a site, is the front-runner among such bright-line contestants. Many if not most jurisdictions, however, have rejected a specific-event-oriented *removal stops here and remediation begins there* bright-line rule.

In rejecting this mutually exclusive ROD-issuance rule, these jurisdictions have, to some degree or another, joined the United States District Court for the Eastern District of California when it opined that "the proposition that remedial activity could not begin prior to the final approval of the permanent remedy [is inconsistent with CERCLA]. This would make the lengthy definition of 'remedy' and 'remedial action' appearing in [§101(24)] meaningless -- the terms would simply be defined as all response activities that occur after final approval of the permanent plan."<sup>156</sup> It has also been argued that remedial action could not begin until EPA issued a "final, written approval of the remedial design," after which "[t]he court declined to adopt such a 'bright-line' rule. 'If [Congress] had intended to require that the EPA issue its final approval of the remedial design in order for a 'remedial action' to begin ... Congress surely would have provided us with a more explicit direction to that effect.'"<sup>157</sup> To the extent the court was trying to drop Congress a not-so-subtle hint, regrettably, Congress has yet to take it.

*Triggering Completion of Removal Actions:* As to the §113(g)(2) completion of removal actions, some jurisdictions, however, have accepted a

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<sup>156</sup> Hyampom, *supra* note 24 at 1392.

<sup>157</sup> Advanced Micro Devices, Inc., v. National Semiconductor Corp., 38 F. Supp.2d 802, 812 (N.D. Cal. 1999), quoting from United States v. Navistar International Transportation Corp. 152 F.3d 702, 711 (7th Cir. 1998).

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non-mutually-exclusive bright-line test under which the issuance of a ROD signals the completion of removal action, if not the initiation of remedial action.<sup>158</sup> Such jurisdictions have more or less adopted the proposition that "a removal action is not complete until a document has been issued which contains the final remedy selected for the site."<sup>159</sup> Nevertheless, even within those jurisdictions that accept the *ROD = completion of removal action* formula, there remains some concern as to what constitutes a ROD's "issuance," although the best argument appears to be the date when all signatories, e.g., EPA and the DOD-agency-owner in a GOCO situation, have signed it.<sup>160</sup> In the glaring absence of a bright-line rule, the courts and respective parties are left to the case-by-case, fact-intensive trench warfare of determining when a removal action is complete, and as will be discussed below, when a remedial action is initiated.

*Triggering Initiation of Remedial Action: Ascertaining the §113(g)(2)(B)*  
"initiation of physical on-site construction of the remedial action" triggering event

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<sup>158</sup> From whence is derived the proverbial, "Spare the ROD, and spoil the removal action." See *United States v. R.A. Corbett Transport, Inc.* 785 F. Supp. 81, 82 (E.D. Tex. 1990); *United States v. Petersen Sand and Gravel, Inc.* 824 F. Supp 751, 755 (n.D. Ill. 1991); *California v. Celtor Chemical Corp.* 901 F. Supp 1481, 1487-1489 (N.D. Cal. 1995); *Pneunmo Abex Corp. v. Bessemer and Lake Erie Railroad Co.*, 936 F. Supp. 1250, 1261 (E.D. Va. 1996); and *United States v. Davis*, 882 F. Supp. 1217, 1225-1227 (D. R.I. 1995).

<sup>159</sup> Hyampom, *supra* note 24 at 1392.

<sup>160</sup> The basis for this is rooted in 40 C.F.R. 300.430(f)(4)(iii)(A), concerning the requirement that the selection of remedial action for NPL sites is made jointly between the head of the relevant department and the EPA. One of the problems with this approach is that there can be a considerable time lapse between the signatories' respective signing.

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proves no less daunting. Dissecting this statutory language into four basic components, a California district court observed that

[I]n order to trigger the limitations period of [§113(g)(2)(B)] the relevant event must possess the following attributes. First, it must be 'physical.' Second, it must have occurred 'on-site.' Third, the activity must be part of the 'construction of the remedial action.' Fourth, ... the activity must constitute the "initiation" of the remedial action.<sup>161</sup>

After as much as conceding that the first, second and fourth *attributes* -- "physical," "on-site," and "initiation"-- are no-brainers, the court focused on the third element, "construction of the remedial action."<sup>162</sup> Upon noting that "construction" is a poor word choice when defining a concept related to "the repair or cleaning of something that already exists," the court, nevertheless, distilled *construction's* statutory significance. "The term still serves the purpose of excluding those preliminary and tentative 'physical and on-site' activities that while related to the remedial action, are not part of its construction."<sup>163</sup> Like so many other aspects of CERCLA, this extremely fact specific, so much so that, a virtually identical activity can be deemed either a removal or remedial action, depending on the circumstances. For example, in Hyampom, after an excruciating analysis, the court noted that "at least in some cases, installation of utilities might be 'removal actions,'" but that under the present set of facts, the installation of utilities (water, electric and phone lines) "played a critical role in the

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<sup>161</sup> Hyampom, *supra* note 24 at 1391.

<sup>162</sup> Hyampom, *supra* note 24 at 1391-1394.

<sup>163</sup> Hyampom, *supra* note 24 at 1392.

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implementation of the permanent remedy” and therefore constituted a remedial rather than removal action.<sup>164</sup>

The legislative history indicates that a remedial action’s statute of limitations begins to accrue with “the commencement of physical on-site construction of the remedial action, that is *after* the [Remedial Investigation / Feasibility Study] and *after* the design of the remedy.”<sup>165</sup> (Emphasis added.) Though the Hyampom court flatly rejected the notion that “a ‘remedial action’ may not occur prior to the final administrative approval of the permanent remedy,” some have nevertheless construed the “after” language of the legislative history to mean that a remedial action SOL starts to run after fieldwork implementing the remedy, as selected in the final ROD, begins.<sup>166</sup>

Even though §107 does not expressly provide for recovery between two or more PRPs, some courts have allowed it, nonetheless.<sup>167</sup> Be that as it may, because the First, Third, Seventh, Ninth, Tenth, and Eleventh Circuits, hold that, at least between private parties, only innocent parties may use §107 for

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<sup>164</sup> Hyampom, *supra* note 24 at 1393.

<sup>165</sup> H.R. Report No.99-253 (III), 99th Congress, 1st Session, reprinted in 1986 U.S.C.C.A.N. 2835, 3044.

<sup>166</sup> Hyampom, *supra* note 24 at 1393.

<sup>167</sup> Key Tronic, *supra* note 110 at 816. This is because in Key Tronic the Supreme Court appears to embrace the idea that there is an element of contribution under both §107 and §113, recognizing an express cause of action for contribution in §113, as well as an implied, “similar and somewhat overlapping” cause of action for contribution in §107. In Pinal Creek Group v. Newmount Mining Corp., 118 F.3d 1298, 1301 & 1306, (9th Cir. 1997), the court found that, “Together, §§107 and 113 provide and regulate a PRP’s right to claim contribution from other PRPs.” It went on to conclude that, “Because a claim asserted by a PRP

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reimbursement of environmental response costs,<sup>168</sup> the §113(g)(2) recovery statute of limitations is not likely to be applied among PRPs.

Although synthesizing this entire §113(g)(2)(B) analysis is more akin to putting socks on a rooster than practicing law, like its removal action sister, establishing the triggering event for remedial action “tend[s] to be highly fact-specific.”<sup>169</sup> The bottom line appears to be that the courts are looking for physical, on-site activities that are critical to the implementation of the permanent remedy. With at least millions, if not billions, of dollars in recoverable response costs hanging in the balance between “removal” and “remediation” due to their as-much-as three-year SOL difference, Congress would have taken greater care in their definitions and respective triggering events.

Other Non-Time §107(a) Advantages:<sup>170</sup> Since primary purpose behind this effort is to examine SOL issues surrounding the government’s need to

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under §107 requires the application of §113, a PRP is limited to a contribution claim governed by the joint operation of §§107 and 113.”

<sup>168</sup> See *United Technologies v. Browning-Ferris Industries*, 33 F. 3d 96 (1st. Cir. 1994); *Bedford Affiliates v. Stills*, 156 F. 3d 416 (2nd Cir. 1998); *New Castle County v. Halliburton NUS*, 111 F. 3d 1116 (3rd Cir. 1997); *Pneumo Abex v. High Point Thomasville & Denton*, 142 F. 3d 769 (4th Cir. 1998); *Aviall Services, Inc. v. Cooper Industries Inc.*, 263 F. 3d 134 (5th Cir. 2001), the “inspiration” behind this rant; *Centerior Services Co. v. Acme Scrap Iron & Metal*, 153 F. 3d 344 (6th Cir. 1998); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F. 3d 761 (7th Cir. 1994); *Pinal Creek Group v. Newmont Milling Corp.*, 118 F. 3d 1298 (9th Cir. 1997); *United States v. Colorado & Eastern Railroad Co.*, 50 F. 3d 1530 (10th Cir. 1995); and *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F. 3d 1489 (11th Cir. 1996).

<sup>169</sup> Geraghty, *supra* note 151 at 926.

<sup>170</sup> I would be grievously remiss to not acknowledge the assistance of Mr. Perry H. Sobel, Senior Trial Attorney for Affirmative Environmental Response Claims, United States Navy Office of the General Counsel, Washington, D.C., who in addition to returning phone calls and answering emails regarding this topic, invited me to a GOCO “workshop” he hosted.

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recoup GOCO-related environmental response costs from its contractor-operator partners, you would *expect* a significant emphasis on §107's six-year SOL made available through §113(g)(2). No doubt about it, unless a plaintiff can avoid a SOL altogether (which, as will be addressed in Section VII, is a distinct possibility), the §113(g)(2) six-year SOL beats §113(g)(3)'s three-year SOL hands down any day. The real issue, however, is about money and how much of it a plaintiff can recover, and not about time *per se*, except that more time often coincides with more money. Thus a six-year SOL is preferable to a three-year SOL only because it provides a plaintiff twice as big a window through which to get back its cleanup costs. Just like windows, even among those of similar size, not all six-year SOLs, are the same. As will be addressed in Section VIII, there are certain circumstances under which a PRP filing a claim for contribution under §113(f)(1) can still have the benefit of a six-year SOL. There is no comparison, however, between a cost recovery action six-year SOL and a through-the-back-door contribution action six-year SOL. While size does matter, at least SOL-wise, it is certainly not the only thing that matters.

*Joint & Several v. Several Liability.* Perhaps the key advantage of a §113(g)(2) six-year SOL for a cost recovery action under §107 is that during this time PRPs are strictly, jointly and severally liable, whereas under §113(f)(1), PRPs are merely severally liable.<sup>171</sup> This means that in a §107(a) action, once the United States (or a state, tribe or innocent party) proves its *prima facie* case,

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it is entitled to recover *all* of its response costs (consistent with the NCP) from *any* single defendant (the deeper the pocket, the better) without having to prove the degree of the defendant's liability.

Once a *prima facie* case is established, and absent the existence of a §107(b) defense, the PRP defendants are strictly liable on a joint and several basis. Accordingly, under this section, a successful plaintiff is entitled to recover the entire costs of remediation from any defendant without having to prove the extent of the defendant's liability. Damages are apportioned according to fault only in the rare circumstances when the defendant can affirmatively prove that the harm is divisible.

By contrast, in actions seeking contribution under §113(f), the plaintiff recovers severally from each liable or potentially liable defendant, and the burden is placed on the plaintiff to establish the defendant's equitable share of response costs.<sup>172</sup>

*Burden-of-Proof Advantage:* There is also a tremendous burden of proof advantage for a plaintiff in a §107(a) recovery action of which §113(f) contribution claim plaintiffs can only dream. It is much, much easier to establish a *prima facie* case in a recovery action than it is to prove a defendant's degree of in a contribution claim. Once again, this is why the United States' "unique [or at least as unique as it can be along with 50 states and tons of tribes] environmental enforcement role"<sup>173</sup> pursuant to §107(a)(4)(A) is so important. Without it, the federal government's only recourse is §113(f)(1) contribution with

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<sup>171</sup> Friedland, *supra* note 123 at 1248.

<sup>172</sup> Chrysler, *supra* note 93 at 855.

<sup>173</sup> Friedland, *supra* note 123 at 1249.



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its more grueling burden of proof.<sup>174</sup> Of course, in all likelihood, within three years of the United States' §107 recovery action, the PRP-cost-recovery-defendant will turn around and become the PRP-contribution-claim plaintiff in a suit against the United States and all the other PRPs it can round up. The difference is that, even if the United States or another §107(a)(4)(A) plaintiff must later don its "PRP Hat" as a defendant in such a contribution claim, the burden of proving the equitable share of the respective PRPs rests with the PRP-contribution-claim plaintiff.

*No "Orphan Shares":* Discussing equitable apportionment among PRPs brings up another issue not heretofore addressed. A significant factor in this dichotomy between §107(a) strict, joint and several liability, and §113(f)(1) several liability is the matter of "orphan shares." "Orphan shares" are those percentages of response-cost responsibility that are attributable to PRPs that cannot be located, cannot be identified or are insolvent.<sup>175</sup> Though perhaps not as common a plague in the GOCO arena as in the private-party community, the dollar value of orphan shares of bankrupt PRPs can be staggering. When considering a facility's environmental response costs can run into the tens and hundreds of millions of dollars, even a single-digit-percentage orphan share can be significant. A plaintiff under §107(a) is unconcerned by the risk of having to pay for some or even all of the orphan shares because it can *pick & choose* its

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<sup>174</sup> Of course, if Aviall is to be believed, a GOCO DOD-agency-owner whose cleanup was conducted absent a pending or adjudicated §106 order or §107(a) litigation, cannot even avail itself of §113(f)(1).

<sup>175</sup> Pinal Creek Group v. Newmont Mining Corp., 118 F. 3d 1298, 1303 (9th Cir. 1997).

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defendant and can recover “all costs of removal or remedial action.” Not so with the contribution-claim PRP plaintiff. Being severally liable, along with its fellow PRPs, the contribution-claim PRP plaintiff may have to absorb the entire orphan share. “As liability in a §113 contribution action is several, the Defendant’s are responsible for their respective contributions to the harm at the [site]. It appears to this court that it would be most inequitable to hold Defendant’s liable for any of the ‘orphan shares’ [under the circumstances].”<sup>176</sup> The best a contribution claim plaintiff can hope for is to be found responsible for that portion of the orphan share “equitably apportioned among all the PRPs.”<sup>177</sup>

Immunizing PRPs who have directly paid for cleanup operations from the risk of sharing the cost associated with orphan shares would undermine the ability of the courts to allocate costs between all PRPs “using such equitable factors as the court determines are appropriate.” Under §113(f)(1), the costs of orphan shares is distributed equitably among all PRPs, just as cleanup costs are.<sup>178</sup> [Citations omitted.]

SUMMARY: Therefore, though it may be difficult to determine what constitutes a recovery action SOL triggering event, and when it is actually triggered, a §107(a) cost recovery action is far superior to a §113(f)(1) contribution claim. Not only (normally) is there a three-year difference during which time a claim may be filed,

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<sup>176</sup> Gould Inc. v. A & M Battery and Tire Service, 901 F.Supp, 906, 913, 915 (M.D. Pa. 1995), vacated by 232 F.3d 162 (3rd Cir. 2000).

<sup>177</sup> Sun, *supra* note 122 at 1193.

<sup>178</sup> Pinal Creek, *supra* note 175 at 1303.

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but a §107(a) recovery action is also superior in terms of degree of response costs that can be recovered –all; a better burden of proof –it is much easier to meet; and a reduced risk of orphan-share apportionment -none.

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*In proportion as the exploitation of one individual by  
another is put an end to, the exploitation of one nation  
by another will also be put an end to. In proportion as  
the antagonism between classes within the nation  
vanishes, the hostility of one nation to another will  
come to an end.<sup>179</sup>*

**SECTION VIII**

**§113(f) CONTRIBUTION: IT'S REVOLUTIONARY**

As readily accepted as §113, "contribution" is today, a statutory entitlement to contribution was unavailable to PRPs prior to 1986 in that recovery is as far as CERCLA went in 1980. So while in the big scheme of things it may not have had a significant impact on world peace, the enactment of §113 with the passage of SARA in 1986 was, nevertheless, nothing short of revolutionary. Prior to then, federal, state and tribal governments, and innocent parties could pursue recovery actions against PRPs, but as among themselves, PRPs were left out of the cleanup-cost-reimbursement picture. As strange as it may seem now, there was no express provision for one strictly liable party who had paid more than its fair or reasonable share of response costs to seek an equitable-cost-allocation-based reimbursement from another PRP at that time.<sup>180</sup>

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<sup>179</sup> Karl Marx & Friedrich Engels, *The Communist Manifesto*, Sec. II, in THE MARXIST READER 44 (Emile Burns ed. 1982).

<sup>180</sup> Key Tronic, *supra* note 110 at 816.

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Judicial Darwinism: Consequently, a cry went up from within the exploited PRP community as to the inequity of §107(a)'s all-or-nothing-at-all reimbursement scheme. Recognizing that they were not entitled *full* recovery due to their *partial* responsibility, PRPs sought a mechanism by which they could be partially reimbursed in proportion to their share. Consequently, many courts recognized the reasonableness of the PRPs' complaint and realized that *all they were saying, was give piece a chance* --a prorated piece of their response costs, not full recovery, to which they clearly were not entitled. The courts, now faced with the antagonism of two classes of competing litigants --PRPs and non-PRPs-- were poised to vanish the hostility between them.

Thus, in the absence of a statutory provision, numerous federal district courts began to interpret §107, often by way of what seemed to be Houdini-esque contortions, so as to recognize an inherent common law right of contribution among joint and severally liable parties.<sup>181</sup> Upon reviewing the Congressional Record, a United States District Court in Ohio opined that:

A reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. The decision was not intended as a rejection of joint and several

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<sup>181</sup> Key Tronic, *supra* note 110 at 816, n. 7, referencing *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (CA6 1985), as citing *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1442-1444 (SD Fla. 1984), *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (SD Ohio 1984), and *Pinole Point Properties, Inc., v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 293 (ND Cal. 1984). *See also* *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989); *U.S. v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986).

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liability. Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.<sup>182</sup> [References to the Congressional Record omitted.]

The codification of the heretofore-implicit federal right to contribution with the enactment of SARA effectively cured the previous inequity created by §107(a) alone, ended the common law machinations utilized by the courts in the interim, and gave PRPs a league of their own. Therefore, the prevailing view among the courts now is that contribution is the means by which one §107(a) PRP may recoup the environmental response costs expended in excess of its equitable share from one or more other §107(a) PRPs.<sup>183</sup>

Allocation Between Multiple PRPs: Where multiple parties are involved, a contribution proceeding to allocate damages among responsible parties follows the initial liability finding.<sup>184</sup> Even though no causation is required to establish liability,<sup>185</sup> the matter of liability should not be confused with the issue of

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<sup>182</sup> United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (SD Ohio 1983).

<sup>183</sup> See Untied Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96, 98-100 (1st Cir. 1994); New Castle City v. Halliburton NUS, Corp. 111 F.3d 1116, 1122 (3rd Cir. 1997); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-1302 (9th Cir. 1997); Rumpke, Inc. v. Cummins Engine Co., 107 F.3d 1235, 1241 (7th Cir. 1997); United States v. Colorado & Easter R.R. Co., 50 F.3d 1530, 1536 (10th Cir. 1995); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996).

<sup>184</sup> United States v. Hercules, Inc. 247 F.3d 706, 718 (8th Cir. 2001).

<sup>185</sup> Goodrich, *supra* note 69 at 517.

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apportionment of damages, wherein causation is a factor. It is entirely possible for a strictly liable PRP to be subsequently absolved of paying for damages once a cost apportionment determination has been made.<sup>186</sup>

*Yours, Mine, and Ours:* To say that apportionment is "intensely factual;"<sup>187</sup> is a gross understatement. This is partially because the universal starting point for divisibility of harm is the apportionment of damages when at least one party can prove either "distinct harms" or a reasonable basis for determining the contribution of each cause to a single indistinct/indivisible harm.<sup>188</sup> When two or more parties cause a single and indivisible harm, each is subject to liability for the entire harm.<sup>189</sup> On the other hand, when two or more parties' actions cause a distinct or single harm for which there is a reasonable basis for division, each is only subject to liability for the portion of the total harm he or she caused.<sup>190</sup> Another reason apportionment is "intensely factual" is that the defendant bares the burden of proving what portion of the subject environmental harm is fairly attributable to the respective PRPs.<sup>191</sup>

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<sup>186</sup> Goodrich, *supra* note 69 at 517.

<sup>187</sup> United States v. Alcan Aluminum Corp., 892 F. Supp 648, 650 (M.D. Pa. 1995), referring to United States v. Alcan Aluminum Corp., 964 F.2d 252, 270 (3rd Cir. 1992).

<sup>188</sup> Hercules, *supra* note 184 at 717, referencing the Restatement (Second) of Torts.

<sup>189</sup> Chem-Dyne, *supra* note 182 at 810.

<sup>190</sup> Chem-Dyne, *supra* note 182 at 810.

<sup>191</sup> Hercules, *supra* note 184 at 717.

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*"Gore Factors"*: Over the years, the courts have made numerous equitable forays into the theretofore uncharted CERCLA wilderness, littering the legal landscape with NBARs (nonbinding allocations of responsibility), and "Gore factors" along the way. Gore factors are equitable considerations that have nothing to do with hanging, or otherwise indisposed, chad, so called after a green-leaning congressman from Tennessee, Albert Gore, who proposed them in an amendment to a 1980 House of Representative's version of CERCLA.<sup>192</sup> As a possible harbinger of future political disappointments, the amendment obviously never made it into the final bill. Nevertheless, the courts have used these namesake factors in ascertaining a PRP's equitable share of response costs.<sup>193</sup>

1. The Ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
2. The amount of hazardous waste involved;
3. The degree of toxicity of the hazardous waste involved;
4. The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of hazardous waste;

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<sup>192</sup> See *United States v. R.W. Meyer, Inc.* 932 F.2d 568, 575-576 (6th Cir. 1991) (discussion of equitable factors in general and Gore factors in particular).

<sup>193</sup> Perhaps this was his reward, in a *cosmic sense of justice kind of way*, for not whining about being robbed when his factors failed to make CERCLA's final cut.



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5. The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristic of such waste; and

6. The degree of cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or environment.<sup>194</sup>

Notwithstanding their celebrity-status pedigree, it should be noted that the Gore factors are neither exclusive nor exhaustive. Consequently, a court may consider other factors, or as many, as few, or even a single determinative other factor, as it deems "appropriate" so as to balance the equities given the totality of the circumstances.

*Response Cost Sharing:* Of course, in order to adequately address this matter of "fair share," it is important to understand just what it is that needs to be *shared fairly*. Section 113(f)(1), provides that, "In resolving contribution claims, the court may allocate **response costs** among liable parties using such equitable factors as the court determines are appropriate."<sup>195</sup> (Emphasis added.) Notwithstanding CERCLA's silence in regard to "equitable factors," at least the Act makes it clear that it is *response costs* and not, say, the volume or the toxicity of any given waste stream *per se*, that is to be allocated. This reflects the fact that not all waste is created equal, and neither are their resultant cleanup costs. More toxic and more hazardous materials disproportionately affect the

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<sup>194</sup> See Cong. Rec. 26,777-, 26,781.

<sup>195</sup> CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1) (1994).

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need for and the level of remediation, which disproportionately affects the response costs associated therewith.<sup>196</sup> Use of response costs as the means of allocation allows free market forces to create a monetary coefficient that synthesizes various waste characteristics such as volume, toxicity, mobility and dispersal.

Under certain circumstances, various measures of waste, such as volume, toxicity, and mobility, or models of a waste's chronologic or geographic dispersal, may coincide with response costs, but very rarely is this the case at your typical Superfund site. These measures only accurately track response costs when the hazardous substances are homogenous or share some other linear relationship. In comparison, cost causation --an examination of how costs are created and who or what parties are responsible for them-- amalgamates the aforementioned equitable factors in an attempt to fairly distinguish the contributions of cost of one party from another. In cost causation analysis, the shares assignable to each party are calculated as the ratio of that party's stand-alone cost ("SAC") relative to the sum of all SAC estimates.<sup>197</sup>

Contribution SOL Triggering Events: The SOL triggering events for contribution under §113(g)(3) are much more streamlined than its §113(g)(2)

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<sup>196</sup> Chem-Dyne, *supra* note 182 at 811.

<sup>197</sup> For an excellent article on this subject from which much of this information was gleaned, see Richard Lane White & John C. Butler III, *Applying Cost Causation Principles in Superfund Allocation Cases*, 28 ENVIRONMENTAL LAW REPORTER NEWS & ANALYSIS 10067 (Feb. 1998).

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counterpart for recovery action SOL triggering events. Rather than the tortuous, case-by-case, fact-intensive analysis required by recovery claims, §113(g)(3) simply states that:

No action for contribution for any response costs or damages may be commenced more than 3 years after--

(A) the date of judgment in any action under this chapter for recovery of such costs or damage, or

(B) the date of an administrative order under [§122(g)] of this title (relating to *de minimis* settlements) or [§122(h)] of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.<sup>198</sup>

This certainly appears to be straightforward enough. If there is a judgment in a cost recovery action, an administrative settlement, or a judicially approved settlement, the three-year statute of limitations begins running on the date thereof. Could it be any simpler? You look at the date on the document, add three years, and presto, you have it -the date after which an action for contribution will be time-barred.

No Contribution SOL Triggering Events: Nevertheless, just when you thought it was safe to get back in the SOL water, the dorsal fin of yet another issue breaks the surface. The recovery action SOL is tied to response costs; thus, a party cannot incur response costs without triggering it. Conversely, the contribution action SOL is tied to one of four non-response-cost-related events, whereby a party can incur response costs without triggering one of them.

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<sup>198</sup>

CERCLA §113(g)(3), 42 U.S.C. §9613(g)(3) (1994).

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Perhaps Congress never considered that a party would voluntarily incur such costs without a legal obligation to do so, e.g., a cost recovery judgment, an administrative settlement, or a judicially approved settlement. While within the private-party community the voluntary assumption of such costs might be uncommon, it would not be unusual for a governmental entity, --oh say, the federal government, a state or a tribe, for instance-- to do so. Thus the seeming simplicity of the §113(g)(3) SOL for contribution all but disappears when a party incurs environmental response costs prior to, or in the absence of, one of these four triggering events.

So the question remains, what happens SOL-wise when a party has incurred cleanup costs in excess of its fair share without the benefit of a §113(g)(3)-triggering event? Some circuits have not ruled on an appropriate statute of limitations under such circumstances, while those that have, have come up with three difference approaches for filling in the void.

The first approach is to read the plain language of the statute of Section 113(g)(3) as establishing no statute of limitations for this particular situation.

The second approach is to use the six-year statute of limitations in Section 113(g)(2).

The third approach is to use the three-year statute of limitations found in Section 113(g)(3), but import an additional triggering event from federal common law.<sup>199</sup>

That is the Readers' Digest condensed version of the three judicial approaches to this problem. What follows is *the rest of the story*.<sup>200</sup>

<sup>199</sup>

City of Merced v. R.A. Fields, 997 F. Supp. 1326, 1334 (E.D. Cal. 1998).

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*3-Year §113(g)(3) SOL Applies but Doesn't Run:* Based on their plain language reading of §113(g)(3), several district courts have concluded that there is no statute of limitations --or that there is one but the clock never starts running-- when response costs are incurred in the absence of one of the four §113(g)(3) triggering events. The United States District Court for the District of Colorado rejected a plaintiff's argument that the §113(g)(3) SOL was inapplicable in its case and that the court should "borrow the limitations period of the most closely analogous federal or state statute" of limitations. "To the contrary," the judge explained, "where as here, the statute sets for a limitations period with specific criteria, I do not look to state law. Instead, I apply the limitations period as mandated by Congress. The statute of limitations applicable in this case does not bar this action."<sup>201</sup> (Citation omitted.)

The apparent rationale of the jurisdictions that have so decided is that what is now §113 was added with the specific intention of tying up the loose ends presented in CERCLA's original form. Not unlike proponents of the axiom, *If God intended for us to go around naked, we'd have been born that way*, these courts have concluded that if Congress had intended for there to be a statute of limitations in the absence of a triggering event, it would have amended CERCLA

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<sup>200</sup> I am deeply indebted and sincerely grateful to Lieutenant Colonel Denise A. Underwood, with the Environmental Law Directorate of the Air Force Materiel Command Law Office, headquartered at Wright-Patterson AFB, OH. Lieutenant Colonel Underwood is an environmental attorney extraordinaire and GOCO SOL expert who graciously shared her thoughts, research, and encouragement, and whose work I hope this effort has in no way undermined.

<sup>201</sup> United States v. Scott's Liquid Gold, Inc., 934 F. Supp. 362, 365 (D. Colo. 1996).

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accordingly. Consequently, if none of the triggers are triggered, the statute of limitations does not begin to run.<sup>202</sup> That is why in denying a defendant's motion for partial summary judgment, a district court in Pennsylvania found that:

The clear language of §113(g)(3) states that "no action for contribution for any response costs or damages may be commenced more than 3 years after (any of the four triggering events.)" As none of the so called triggering events have occurred, [plaintiff's] claim, which is one for contribution, is timely brought. [Plaintiff's] entering into a section 106 consent order with the EPA [more than seven years before filing the subject claim] is not one of the four triggers for running the statute of limitations. Accordingly, Defendant's motion for partial summary judgment with respect to [plaintiff's] action being time barred by the statute of limitations in §113(g)(3) is denied.<sup>203</sup> [Parenthesis in original. Brackets added.]

Although none of these cases have been specifically overruled, both the Scott's Liquid Gold (Utah) and the Ekotek (Colorado) courts are in the Tenth Circuit, and the Tenth Circuit has adopted the §113(g)(2) approach, described below. On the other hand, albeit in *dicta*, the Seventh Circuit in Rumpke has suggested that this, i.e., the no statute of limitations/the statute of limitations has yet to run approach, is the appropriate solution.<sup>204</sup>

Therefore, it goes without saying, that if a private-party plaintiff finds itself in a jurisdiction that is either undecided as to the matter, or is in one that embraces this application of the incurred-response-costs-without-a-contribution-

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<sup>202</sup> United States v. Scott's Liquid Gold, Inc., 934 F. Supp. 362, 365 (D. Colo. 1996); Gould Inc. v. A & M Battery and Tire Service, 901 F.Supp. 906, 914-915 (M.D. Pa. 1995), vacated by 232 F.3d 162 (3rd Cir. 2000); Reichhold Chemicals, Inc., v. Textron, Inc. 888 F. Supp. 1116, 1125 (N.D. Fla. 1995); and Ekotek Site PRP Committee v. Self, 881 F. Supp. 1516, 1522-1524 (D.Utah 1995).

<sup>203</sup> Gould, *supra* note 176 at 915.

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triggering-event scenario, it would be best served by this approach. Similarly, if a governmental-entity PRP's §107(a) cost recovery action is denied for some erroneous reason, or if it is beyond the §107(a) / §113(g)(2) SOL, then it too should avail itself of this plain-language interpretation of §113(g)(3) if at all possible. Under such circumstances, whether a private-party PRP, or government entity wearing its "PRP Hat," *time is on its side*.<sup>205</sup>

*3-Year/6-Year §113(g)(2) Recovery SOL Applies:* When there are contribution-action-qualifying expenditures for environmental response costs but no triggering events, some courts have concluded that §113(g)(2)'s three-year removal action and six-year remedial action statutes of limitations should apply. Like a reoccurring nightmare, this §107(a)-impersonating approach requires all the fact-specific analysis of the genuine article, but other than the protracted SOL, none of its previously discussed benefits.

Thus, for contribution claims under these circumstances the removal action SOL is for three years from the completion of the removal action, which in some jurisdictions is triggered by the issuance of a ROD. Similarly, the SOL for a remedial action under these circumstances is six years from the initiation of physical, on-site activities that are critical to the implementation of the permanent remedy. Of course, like a §107(a) recovery action, the costs associated with removal actions may be brought in a claim for remedial costs *if* the remediation is

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<sup>204</sup> Rumpke of Indiana v. Cummins Engine Co., Inc., 107 F.3d 1235, 1241 (7th Cir. 1997).

<sup>205</sup> My apologies to big-lipped rock musician Michael Philip "Mick" Jagger (1943- ).

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“initiated” within three years of the removal action’s completion. Similarly, subsequent actions for additional costs associated with removal *or* remedial actions may be brought at *any* time during the response action, provided it is *not later than* three years after the completion of *all* response actions.<sup>206</sup>

The Tenth Circuit tried to rationalize why it chose such a circuitous route for ignoring the plain language of §113(g)(3)’s SOL provision by asserting that:

[Section 113(f)] did not create a new cause of action, nor did it create any new liabilities. “It is no more than a ‘mechanism for apportioning CERCLA-defined costs.’ Thus, of necessity it must incorporate the liability set forth in §107(a), as those are the costs to be equitably apportioned.”

...

It is thus clear that “because §113(f) incorporates the liability provisions of §107, ... a §113(f) action for contribution is an action under §107.” While a contribution action is not a “cost recovery” action under §107 as that action has been defined, because it does not impose strict, joint and several liability on the defendant PRPs, it is an action for recovery of the costs referred to in §107. Under CERCLA’s statutory scheme therefore, a PRP’s contribution action seeks to recover costs referred to in §107 from PRPs whose liability is defined by §107, but is governed by the equitable apportionment principles established in §113(f).<sup>207</sup> [Citations omitted.]

Though perhaps less than convincing to me, the Fifth Circuit liked the Tenth Circuit’s approach to contribution claims where the §113(g)(3) triggering events have yet to be realized, and attempted to *explain* the Tenth Circuit’s *explanation*, only more articulately:

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<sup>206</sup> CERCLA §113(g)(2), 42 U.S.C. §9613(g)(2) (1994).

<sup>207</sup> Sun, *supra* note 122 at 1191, quoting from Bancamerica Commercial Corp. v. Mosher Steel of Kansas, 100 F. 3d 792, 800 (10th Cir. 1996) as amended, 103 F. 3d 80 (10th Cir. 1996), in which the Bancamerica court quotes County Line Investment Co. v. Tinney, 933 F. 2d 1508, 1517 (10th Cir. 1991).



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In other words, a section 113 contribution action is a claim for collection of the costs referred to in section 107. By definition, the Tenth Circuit reasons, a contribution action is merely one type of cost-recovery action. If there has been no prior section 107 cost-recovery action, a contribution action becomes an "initial action for recovery of the costs referred to in section [107] of this title," and must be brought "within 6 years after initiation of physical on-site construction of the action. (quoting 42 U.S.C. §9613(g)(2)(B)).<sup>208</sup>

Notwithstanding its purported reverence of CERCLA's plain language in cases such as, oh, say Aviall, for instance, CERCLA's plain language was a bit too plain for the Fifth Circuit to stomach in Geraghty, preferring its more creative gourmet-palate holding, that:

[T]he statute of limitations found in CERCLA section 113(g)(2) applies to initial contribution actions such as this. If we were to accept Conoco/Vista's [plain language] argument and apply section 113(g)(3), the statute of limitations would be indefinite because a triggering event might never occur. This result would undermine the certainty that statutes of limitations are designed to further.<sup>209</sup>

Similarly, the United States Court of Appeals for the Sixth Circuit has joined its sister courts' brethren by jumping on the Sun v. Browning-Ferris<sup>210</sup> bandwagon, citing it with unabashed approval.<sup>211</sup> The Ninth Circuit has yet to rule on the matter although it had the opportunity to do so "indirectly" in Pinal Creek, before it shied away, stating, "No statute of Limitations issue is before us

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<sup>208</sup> Geraghty, *supra* note 151 at 924-925.

<sup>209</sup> Geraghty, *supra* note 151 at 925.

<sup>210</sup> Sun, *supra* note 122 at 1193-1194.

<sup>211</sup> Centerior, *supra* note 130 at 355.

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in this case and we decline the Pinal Group's invitation to opine on it indirectly."<sup>212</sup> Having said so, it may have, nevertheless, indicated its disapproval of the first approach later in the same paragraph when it observed that, "The court directly faced with the issue must determine whether §113(g)(3) [three-year SOL], §113(g)(2) [three-year/six-year SOL], or some other statute should apply. See United Tech., 33 F. 3d at 99 (expressing uncertainty as to which of the two periods would apply in this context)."<sup>213</sup> (Citation in original. Footnote omitted.) Similarly, perhaps taking a cue from its Ninth Circuit parent, in *dicta* the Eastern District of California, indicated that it "is convinced that either the second [§113(g)(2) three-year/six-year] or the third [§113(g)(3) three-year] approach should apply."<sup>214</sup>

On the bright side, a possible six-year SOL is certainly better than a maximum three-year SOL, at least from a contribution-claim plaintiff's perspective. Of course, the downside to a contribution-claim-masquerading-as-a-recovery-claim is that a plaintiff has all the fact-intensive, judicial-crap-shoot certainty of when the SOL will begin to run of a §107(a) cost recovery action, with none of the benefits associated therewith. For example, gone is the entitlement to full recovery; gone is the substantial burden-of-proof advantage, and gone is the zero possibility of orphan share apportionment.

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<sup>212</sup> Pinal Creek, *supra* note 175 at 1305.

<sup>213</sup> Pinal Creek, *supra* note 175 at 1305.

<sup>214</sup> City of Merced, *supra* note 199 at 1335.

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*3-Year §113(g)(3) SOL Applies With Borrowed Trigger:* When there are expenditures for environmental response costs but no triggering events, the third and final, although least frequent approach, is to apply the three-year statute of limitations provided for in §113(g)(3) by implying an applicable triggering event not expressly provided in §113(g)(3). When applying this approach, the courts “borrow” (legalese for *pull out of thin air*) a triggering event from some other source, such as federal common law. The rationale behind this statutory surrogate parenting approach is that it is obvious Congress intended contribution claims to be filed within three years of *something* and inconceivable that Congress would have intentionally omitted to supply a triggering event. This, arguably, is evidenced by CERCLA’s structure, which demonstrates a legislative attempt to constrain both cost recovery and contribution actions to definite periods of time. The proponents of this approach conclude that in light of §113(f)(1)’s impotence in this regard, the next best thing to a natural-born triggering event is to adopt a triggering event from another statutory or regulatory family with features similar to its contribution-SOL-impaired putative parent.

It should be noted, however, that few district courts have embraced this *if the shoe doesn’t fit barrow your neighbor’s* approach. Notwithstanding the fact that it was reversed in pertinent part by the Tenth Circuit, Sun Co. (R&M) v. Browning-Ferris is an example of a district court applying this approach.<sup>215</sup> “In

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<sup>215</sup> Sun Co., Inc. (R&M) v. Browning-Ferris, Inc., 919 F. Supp. 1523, 1531 (N.D. Okla. 1996).rev’d in pertinent part, Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997).

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that decision [Sun (R&M)], the court applied the three-year statute of limitations for contribution actions, but imported a triggering event from a Third Circuit case holding that a (non-CERCLA) contribution action accrues when a party seeking contribution has paid more than his fair share of a common liability.”<sup>216</sup> Though short of an endorsement, the California district court commented in a footnote immediately following the explanation above, that, “The California standard is similar. In California, a right of contribution accrues when a money judgment has been rendered and the party seeking contribution has paid more than his fair share of liability.”<sup>217</sup> Needless to say, as has been discussed at length previously, the burden of proof rests with the PRP that believes it has paid more than its fair share of the environmental response costs.

Of course, courts adopting this *three-year SOL with a borrowed triggering event* approach are not bound by a paid-more-than-its-fair-share triggering event. That is the beauty of making up the rules as you go. They can fashion a triggering from most anything. In this regard, it has also been suggested that delisting from the NPL would serve as a suitable triggering event, in that it affords many of the characteristics and safeguards as the four §113(g)(3) triggering events. Specifically, being removed from the NPL would: 1) provide notice to fellow PRPs of their need to pursue a contribution claim; 2) fix the total amount of liability in that delisting is only accomplished once it is established that

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<sup>216</sup> City of Merced, *supra* note 199 at 1334-1335.

<sup>217</sup> City of Merced, *supra* note 199 at 1335, n.11.

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no additional response actions are appropriate; 3) offer procedural safeguards similar to those in the statute's enumerated triggering events; and 4) provide for public notice and a 30-day comment period.<sup>218</sup>

Sharing is good. I encourage my children to share. As a general rule, I believe in sharing, but this attempt to finesse §113(g)(3), is an exception to the rule. This approach is reminiscent of the Biblical account of the man who was struck dead as he grabbed the Ark of the Covenant in an attempt to prevent it from falling off of a cart and onto the ground. In his arrogance, it never occurred to him that the Ark's impacting the earth was preferable to its coming in contact with human hands. Some things, as undesirable as the consequences might appear, are nevertheless better off left untampered with. So it is with this final, and hardly ever employed approach.

SUMMARY: Therefore, if a party incurred environmental response costs as the result of a §113(9)(3)-triggering event, the three-year SOL for a §113(f)(1) claim for contribution is quite straightforward. If a contribution claim plaintiff incurs such costs in the absence of a §113(g)(3)-triggering event, then the SOL may be three years, six years, or it may not have even begun to run, depending on the circuit. Perhaps I am old fashioned but, I am for the most part, a stick-to-the-plain-language-of-the-statute-kind-of-guy. Thus, on the one hand, the first approach discussed, *the §113(g)(3) SOL applies but it has yet to be triggered*

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<sup>218</sup>

*See* 40 CFR 300.425(e).

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approach, would have my vote, for many of the same reasons as the district courts that espoused it. Not unlike the paleontologists who “reconstruct” an entire 60-foot dinosaur from the fragment of a solitary fossilized jawbone, I tend to lean in the direction that the courts adopting the other two approaches have gone too far. On the other hand, I share the Geraghty court’s sentiments that the *without a triggering event there is no SOL* approach flies in the face of “the certainty that statutes of limitations are designed to further.” It seems inherently wrong that there should be such a disparity SOL-wise between the circuits.

Though I am willing to give Congress the benefit of the doubt concerning the goodness of its intentions in enacting §113, I am reminded of Justice Scalia’s time-honored advice to which the dissent referred in Aviall: “It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>219</sup> To the extent that doing so creates an inequity, I respectfully suggest that “it is for Congress or a higher court to address,”<sup>220</sup> not the lower courts, and certainly not this lowest court in which I reside.

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<sup>219</sup> Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

<sup>220</sup> City of Merced, *supra* note 199 at 1333.

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*To every thing there is a season,  
and a time for every purpose under heaven.  
... A time to plant and a time to pluck up  
that which is planted.<sup>221</sup>*

**SECTION IX**

**STATUTES OF LIMITATIONS: TIMING IS EVERYTHING**

As we have discovered, the Fifth Circuit uncharacteristically understated this whole SOL subject matter when it observed that it presents “question[s] of law with some complexity” that “tend to be highly fact-specific.”<sup>222</sup> The facts determine what is and what is not a recovery action or contribution claim, who is and who is not a PRP, and what is and what is not a SOL triggering event. The facts determine the timing, and as with all SOL related matters, timing is everything. In this section, one real case, and ten hypothetical situations will illustrate the time-related significance of the facts surrounding any particular situation.

Close Only Counts in Horseshoes and Hand-Grenades: Of the dozens of cases that address environmental response cost reimbursement SOL issues, the unforgiving harshness of recovery and contribution statutes of limitations was

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<sup>221</sup> *Ecclesiastes 3:1-2* (King James).

<sup>222</sup> Geraghty, *supra* note 151 at 926.

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perhaps best demonstrated in State of California vs. Hyampom Lumber Co. After California invested nearly a decade and an unspecified fortune in environmental response costs, the defendants moved for summary judgment, asserting that §113(g)(2)'s six-year SOL had time-barred California's claim. Once all the legally complex and fact-specific dust settled,

The court therefore, conclude[d] that the "initiation of the physical on-site construction of the remedial action" occurred on **September 15, 1988**, when work began on the installation of water and electricity to the Jensen Site. Since plaintiff's suit was commenced on **September 30, 1994**, it is untimely.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment be, and the same hereby is, GRANTED.<sup>223</sup>  
[Emphasis add. Capitalization in original.]

Do the math: Sept. 30, 1994 - Sept. 15, 1988 = 6 years & 15 days. Fifteen days! The taxpayers of California missed out on what would have been a slam-dunk, strict, joint-and-several cost recovery of what was undoubtedly millions of dollars in environmental response costs --by fifteen days. Fifteen calendar-days; ten business-days; a few dozen coffee breaks. They had 2,191 days in which to file, yet they missed the jackpot by less than seven-tenths of one-percent of that time. It has been said that to fully appreciate the significance of one one-hundredth of a second, you should talk with a silver-medal Olympic swimmer. Similarly, to fully appreciate the significance of 15 days stretched out over six years, one should talk to the head (or possibly former head) of the

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Hyampom, *supra* note 24 at 1394.



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California Department of Toxic Substance Control. Though hardly a laughing matter, it is nevertheless painfully obvious that, much like comedic delivery, timing is everything in the world of environmental response cost recoupment.

Word Pictures Worth a Thousand Words: Because these legally complex, fact-specific concepts can be relatively abstract, some examples of their application to an unrealistically oversimplified hypothetical GOCO will, I hope, prove helpful. Assuming that a picture is worth a thousand words, then arguably, a *word picture* is worth a million words. For purposes of these scenarios, our unrealistic, utterly contrived hypothetical GOCO will initially be characterized according to the following parameters:

1. Sixty-one years ago, in 1941, the United States Army built a munitions manufacturing plant at the juncture of a long and winding road and a railroad spur in Yoko, Anystate. Subsequently, the Army, the original owner, and Imagine Engineering Enterprises Inc. ("IEEI"), a successful government contractor at the time, entered into a facilities contract regarding Yoko GOCO.

2. IEEI, pursuant to numerous production contracts with the Army, manufactured various types of munitions for five years at Yoko GOCO. In 1946, shortly after World War II, IEEI's board of directors and key employees decided to go out of business and follow their genuine Indian guru to an undisclosed mountaintop commune, never to be seen again. Immediately thereafter, the

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Army entered into a facilities contract and an assortment of production contracts with the I. M. Walrus Co.

3. Yoko remained operational for an additional 20 years until 1966, when Walrus began, quite successfully, to manufacture tractors, thereby turning its swords into plowshares so to speak, albeit at a different facility. During its production-life, extensive amounts of hazardous substances were released into the environment at Yoko.

4. Shortly after Walrus's departure, a retired Army non-commissioned officer who had supplied replacement parts for Walrus's vehicle fleet, decided Yoko would be an ideal location for his post-retirement business, a combination drive-through bar and exclusive automobile components kiosk. Consequently, in 1966, the Army sold Yoko GOCO to the retired soldier who shortly thereafter opened Sergeant Pepper's Only Parts Pub Stand, which continues to own the former GOCO site.

5. The undisputed allocation of responsibility for the environmental response costs among the respective PRPs is:

U.S. Army, 40% as an owner for 25 years (1941-1966)

IEEI, 15% as an operator for 5 years (1941-1946)

Walrus, 40% as an operator for 20 years (1946-1966)

Sgt. Pepper, 5% as an owner/operator for 36 years (1966-present)

6. Upon learning of the environmental contamination, the Army, as would any good environmental steward, voluntarily initiated cleanup of the site

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consistent with the NCP, and incurred \$10 million in §107(a)(4) necessary response costs in doing so. Of these cleanup costs, it is undisputed that \$2 million were for §107(a)(4) removal actions and that the remaining \$8 million represented the costs of §107(a)(4) remedial actions.<sup>224</sup>

7. Since IEEI no longer exists, and Sgt. Pepper has no assets of which to speak, the Army would like Walrus to reimburse it for as much of its response costs as it can legally recoup.

*Recovery Action Scenarios:* This first set of scenarios will illustrate how the applicable §113(g)(2) SOLs would apply in a GOCO-related voluntarily-incurred cost recovery action commenced by DOD under §107(a). Under most circumstances, this would be the civil action of choice due to the United States' unique §107(a)(4)(A) governmental status as an environmental steward. Of course, as a past or present GOCO owner, DOD will always be a PRP, and as such will almost always be embroiled in a claim for contribution, which the second set of scenarios will examine. The next five scenarios, however, are limited to recovery actions' §113(g)(2) SOLs.

SCENARIO NO. 1, RECOVERY LESSON I: Based on the above fact-pattern, the Army, as Yoko GOCO's owner, is a §107(a) PRP. In regard to establishing a

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<sup>224</sup> These dollar-figures, like the rest of the "facts," are contrived, and are not intended to be representative of actual environmental response costs. Instead, they were selected for the sole purpose of facilitating the application of the "undisputed allocation" percentages to the total cleanup costs in the contribution-related scenarios that follow. The objective was to make the math as easy as possible, not to infer a MSRP for GOCO cleanups.

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*prima facie* case for the reimbursement it seeks, Walrus is also a §107(a) PRP as an operator of Yoko GOCO, which is a §101(9) facility, where there has been a §107(a) release, for which the Army has incurred costs in responding thereto in a manner consistent with the NCP as described in §105. In this case, the Army can prove that its \$2 million removal actions were completed on January 1, 1995 and that its \$8 million remedial actions were initiated on January 15, 1995.

On February 1, 2001, the Army filed suit against Walrus for reimbursement under §107(a) in a United States district somewhere other than the Fifth Circuit, where the court correctly acknowledges the Army's unique governmental status as an environmental steward pursuant to §107(a)(4)(A).

Not surprisingly, Walrus moved for summary judgment contending that the applicable SOL had run.

The court subsequently found that both the Army's \$2 million claim for the costs of removal actions and the \$8 million claim for the costs of the remedial actions were time-barred. This was because the February 1, 2001 suit was not "commenced ... within 3 years after the [January 1, 1995] completion of the removal action," nor "within 6 years after the [January 15, 1995] initiation of the physical on-site construction of the remedial action," in keeping with §113(g)(2)(B). Consequently, the court granted Walrus's motion for summary judgment, even though Walrus was undisputedly responsible for 40% of Yoko GOCO's cleanup costs.

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*In this scenario, even though the court would have acknowledged the Army's unique role as a government entity, it never got that far because the Army's claim was clearly filed after both the removal and remedial action SOLs had run.*

SCENARIO NO. 2, RECOVERY LESSON II: Based on the same fact-pattern, the Army can clearly establish a *prima facie* case for reimbursement. This time the Army can prove that its \$2 million removal actions were completed on January 15, 1992 and its \$8 million remedial actions were initiated on March 15, 1995.

Once again, on February 1, 2001, the Army filed suit against Walrus under §107(a), in an extra-Fifth Circuit district court that correctly acknowledges the Army's unique governmental status as an environmental steward pursuant to §107(a)(4)(A).

True to form, Walrus argued that the Army's removal action was time-barred. It also contended that because the Army was a PRP, it was limited to a §113(f)(1) contribution claim, and that it would be manifestly unfair for it to pay for all the response costs when there were three other PRPs, the Army, IEEL, and Sgt. Pepper's Only Parts Pub Stand.

This time the court found that the Army's \$2 million claim for the costs of removal actions was time-barred. This was because the Army's February 1, 2001, suit for recovery was not "commenced ... within 3 years after the [January 15, 1992] completion of the removal action," as required by §113(g)(20)(A). Nevertheless, in keeping with the strict, joint and several liability imposed by

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§107(a), the court awarded the Army the full amount of its \$8 million remedial action claim, even though the Army was undisputedly responsible for 40% of Yoko GOCO's cleanup costs. This was because its February 1, 2001 suit was "commenced ... within 6 years after the [March 15, 1995] initiation of the physical on-site construction of the remedial action," pursuant to §113(g)(2)(B).

*In this scenario, both the Army's unique §107(a)(4)(A) status as a governmental entity and the SOL were issues. Here, the SOL analysis was still quite straightforward; the claim for the removal action was stale, while the claim for the remedial action was timely.*

SCENARIO NO. 3, RECOVERY LESSON III: Based on the same fact-pattern, the Army can once again clearly establish a *prima facie* case for reimbursement. This time the Army can prove that its \$2 million removal actions were completed on February 15, 1998 and its \$8 million remedial actions were initiated on March 15, 1998.

As usual, on February 1, 2001, the Army filed suit against Walrus under §107(a), in an extra-Fifth Circuit district court that correctly acknowledges the Army's unique governmental status as an environmental steward pursuant to §107(a)(4)(A).

As might be expected, Walrus argued that because the Army was a PRP, it was limited to a §113(f)(1) contribution claim.

Walrus's protestation notwithstanding, in keeping with the strict, joint and several liability imposed by §107(a), the court awarded the Army the full amount

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of its combined \$10 million claim even though the Army was undisputedly responsible for only 40% of Yoko GOCO's cleanup costs. This was because the Army's February 1, 2001 suit was "commenced ... within 3 years after the [February 15, 1998] completion of the removal action," and "within 6 years after the [March 15, 1998] initiation of the physical on-site construction of the remedial action," pursuant to §113(g)(2)(B).

*In this scenario, both of the Army's claims were deemed timely because the case was filed within three years of the removal action being completed and within six years of the remedial action being initiated. Of course, in reality, it is quite likely that in a subsequent contribution action, Walrus would end up recouping some of the Army's award. However, as will be demonstrated in Scenario No. 5, had the court failed to acknowledge the Army's §107(a)(4)(A) status, the outcome would have been much different.*

SCENARIO NO. 4, RECOVERY LESSON IV: Based on the same fact pattern, the Army can clearly establish a *prima facie* case for reimbursement. This time the Army can prove that its \$2 million removal actions were completed on March 15, 1992 and its \$8 million remedial actions were initiated on February 15, 1995.

Once again, on February 1, 2001, the Army filed suit against Walrus under §107(a), in an extra-Fifth Circuit district court that correctly acknowledges the Army's unique governmental status as an environmental steward pursuant to §107(a)(4)(A).

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Not surprisingly, but to no avail, Walrus argued that because the Army was a PRP, it was limited to a §113(f)(1) contribution claim.

This time, in keeping with the strict, joint and several liability imposed by §107(a), the court found that both the \$2 million claim for removal action costs and the \$8 million claim for remedial action costs were timely, and awarded the Army its full \$10 million, even though it was undisputedly responsible for 40% of the Yoko GOCO cleanup costs. This was because the Army's February 1, 2001, suit for recovery was "commenced ... within 6 years after the [February 15, 1995] initiation of the physical on-site construction of the remedial action," and that because "the [February 15, 1995] remedial action [was] initiated within 3 years after the [March 15, 1992] completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action," pursuant to §113(g)(2)(B).

*In this scenario, both of the Army's claims were deemed timely, but for reasons totally different than in Scenario No. 3. In this case, even though the case was filed almost nine years after the removal action was completed, the removal action claim was timely. This is because the case was filed within six years of the remedial action being initiated and because the remedial action was initiated within three years of the removal action's completion. Under such circumstances, the costs of the removal action can be bootstrapped along with the claim for the costs of the remedial action.*



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SCENARIO NO. 5, RECOVERY LESSON V: Based on the same fact-pattern, the Army can once again clearly establish a *prima facie* case for reimbursement. This time the Army can prove that its \$2 million removal actions were completed on February 15, 1998 and its \$8 million remedial actions were initiated on March 15, 1998.

Once again, on February 1, 2001, the Army filed suit against Walrus under §107(a), in an extra-Fifth Circuit district court. The only difference between this jurisdiction and those in the first four hypothetical situations is that this court erroneously fails to recognize the Army's unique governmental status as an environmental steward pursuant to §107(a)(4)(A).

As might be expected, Walrus argued that because the Army was a PRP, i.e., not an innocent party, the Army was limited to a §113(f)(1) contribution claim.

Walrus's protesting paid off in this jurisdiction. As far as this court was concerned, when the removal and remedial actions stopped and started was immaterial. The Army was a PRP, and since the court failed to make the distinction between private-party cost recovery plaintiffs and government-entity cost recovery plaintiffs, the Army got goose-egg, even though Walrus was undisputedly responsible for 40% of Yoko GOCO's cleanup costs.

*In this case, the SOL issue never arose, even though the case was filed within three years of the removal action being completed and the remedial action being initiated. This is the identical hypothetical set out in Scenario No. 3,*

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*except for the courts' different takes on §107(a)(4)(A). In Scenario No. 3, however, the Army was awarded 100% of its \$10 million claim, whereas here, in Scenario No. 5, it did not get a dime. If the Army is to recoup any of its cleanup costs, it will now have to do so via a §113(f)(1) contribution claim. The good news is, this ruling would constitute a §113(g)(3)(A) contribution-claim triggering event as a "judgment in [an] action under this chapter for recovery of such costs or damages," and the Army would have three years from the date of the judgment to bring its contribution claim.<sup>225</sup> The bad news is, in such a default contribution claim, the Army will have a more involved and more difficult-to-establish burden of proof, not to mention a portion of any orphan share*

*Contribution Claim Scenarios:* As was mentioned earlier, in its GOCO ownership capacity, a DOD agency will always be a PRP, and as such, one way or another, will frequently be subjected to the inconvenience, if not the indignity of a contribution claim. As are all litigants, the DOD agency will either be a plaintiff or a defendant in such contribution actions.

It should come as no surprise that DOD frequently finds itself as a defendant in a contribution claim, having been sued by a §107(a)(4)(B) "any other person," or a fellow PRP. Sometimes the contribution claim, whether filed by an innocent party or another PRP, is the initial action in the plaintiff's efforts to

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<sup>225</sup> If the Army had filed its initial recovery claim on the front end of that action's six-year SOL, it may have lost some time. Conversely, if it filed its initial recovery claim just before the SOL was about to expire, it would have benefited from having another three years in which to bring its contribution claim.

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recoup cleanup costs in excess of its fair share. Sometimes it is the subsequent role-reversal lawsuit following a successful DOD recovery action, where the strict, joint and severally liable recovery defendant is the contribution-claim plaintiff seeking reimbursement from DOD. Regardless of how DOD becomes a contribution-claim defendant, the contribution-claim plaintiff's pursuit of several liability is made that much more difficult by the more involved burden of proof and the need to find a home for orphan shares.

Sometimes, DOD assumes the role of plaintiff either because a court has denied its §107(a)(4)(A) governmental-entity status in an earlier cost recovery action, or because DOD has failed, knowingly or unknowingly, to exercise its §107(a)(4)(A) authority. The chances of DOD drawing a *Do Not Pass Recovery - Go Directly to Contribution* card should be increasingly unlikely as most jurisdictions make the distinction between governmental and private-party PRPs. Perhaps the only circumstance under which DOD would knowingly ignore its §107(a)(4)(A) birthright and *initially* file suit as a §113(f)(1) contribution claim plaintiff would be when all the SOLs afforded by §113(g)(2) have already run. Even so, this would only prove advantageous in a jurisdiction that either embraces the *there is no SOL/the SOL has yet to run* approach, or where the jurisdiction has yet to decide what approach to take in the absence of a §113(g)(3) triggering event. No matter the circumstances under which DOD would be a contribution claim plaintiff, in doing so it takes on the more difficult

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burden of proof, several liability, and the orphan share risks and challenges discussed earlier.

As was previously discussed, DOD has voluntarily undertaken a great deal of environmental response costs at numerous GOCOs across the country. Of course, when there are voluntary cleanups, there are no initial §113(g)(3) SOL triggering events, and where there are no triggering events, the courts have responded using the three approaches discussed in Section VIII. In its affirmative attempts to recoup some of its environmental response costs, DOD will always be the plaintiff, at least in the initial reimbursement action. Thus, using the same basic fact pattern above along with scenario-specific alterations thereto, this next set of scenarios will explore how these three no-contribution-SOL-triggering-event approaches might be applied to a DOD plaintiff.

SCENARIO NO. 6, CONTRIBUTION LESSON I: Based on the same fact pattern outlined above, the Army can clearly establish a *prima facie* case for reimbursement. This time the Army can prove that its \$2 million removal actions were completed on January 15, 1992 and its \$8 million remedial actions were initiated on March 15, 1992. The Army realizes that all cost recovery SOLs under §113(g)(2) have run, but this is a §113(f)(1) contribution claim, and not a §107(a) cost recovery action, and no §113(g)(3) triggering events have been triggered.

Thus, on February 1, 2001, the Army filed suit against Walrus under §113(f)(1), in a United States district court in Pennsylvania. This is fortuitous

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because Pennsylvania is a jurisdiction that, in the absence of a §113(g)(3)-triggering event, maintains that there is no statute of limitation --or that there is one, but the clock never starts running.<sup>226</sup> (The Army could be just as fortunate filing in Florida.<sup>227</sup> It is also possible the Army could get the break it needs, if it is lucky, in Utah<sup>228</sup> or Colorado,<sup>229</sup> although the Tenth Circuit has adopted a different approach.<sup>230</sup> It might also fare well in the Seventh Circuit, which has suggested in *dicta* that it favors this approach, and, of course, the Army is free to advocate for this approach in any undecided jurisdiction, as well.)

This time around Walrus argued that the Army's contribution claim must be time-barred, and suggested that the court should borrow the limitations period of the most closely analogous federal or state statute of limitations.

The good news for the Army is that court found that since none of the so-called triggering events had occurred, the Army's contribution claim was timely brought. The court declined Walrus's suggestion, concluding that when a statute sets a limitation period with specific criteria, the court would abide by the SOL mandated by Congress and not look to other provisions. The bad news is that unlike §107(a)'s strict, joint and several liability, under §113(f)(1) the PRPs are

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<sup>226</sup> Gould, *supra* note 176 at 915.

<sup>227</sup> Reichhold Chemicals, Inc., v. Textron, Inc. 888 F. Supp. 1116, 1125 (N.D. Fla. 1995).

<sup>228</sup> Scott's Liquid Gold, *supra* note 201 at 365.

<sup>229</sup> Ekotek Site PRP Committee v. Self, 881 F. Supp. 1516, 1522-1524 (D.Utah 1995).

<sup>230</sup> Sun, *supra* note 122 at 1191, quoting from Bancamerica Commercial Corp. v. Mosher Steel of Kansas, 100 F. 3d 792, 800 (10th Cir. 1996) as amended, 103 F. 3d 80 (10th Cir. 1996), in which the Bancamerica court quotes County Line Investment Co. v. Tinney, 933 F. 2d 1508, 1517 (10th Cir. 1991).

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merely severally liable. Consequently, the court placed the burden of proof on the Army to establish Walrus's degree of contribution (40%), and since IEEI is no more; and Sgt. Pepper is insolvent, their entire collective 20% orphan share was absorbed by the Army.<sup>231</sup> (In some jurisdictions, however, "the costs of the orphan shares is distributed equitably among all the PRPs."<sup>232</sup>) Thus, even though the Army was undisputedly responsible for 40% of the \$10 million cleanup costs, in addition to a longer, more expensive proceeding, it ended up paying for 60%, or \$6 million, of Yoko GOCO's cleanup.

*In this scenario, the Army, for whatever reasons, was a §113(f)(1) contribution-claim plaintiff. Because of the jurisdiction's application of the No-SOL/the-SOL-has-yet-to-start-running approach, the Army could at least recoup 40% of its voluntarily initiated response costs. In many jurisdictions, however, its contribution claim would have been time-barred.*

SCENARIO NO. 7, CONTRIBUTION LESSON II: Based on the same fact pattern outlined above, the Army can clearly establish a *prima facie* case for reimbursement. This time the Army can prove that its \$2 million removal actions were completed on January 1, 1995 and its \$8 million remedial actions were initiated on January 15, 1995.

On February 1, 2001, the Army filed suit against Walrus under §113(f)(1), in a United States district court in the Sixth or Tenth Circuits. (When there are

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<sup>231</sup> Gould, *supra* note 176 at 913 & 915.

<sup>232</sup> Pinal Creek, *supra* note 175 at 1303.

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contribution-action-qualifying expenditures for environmental response costs but no triggering events, these jurisdictions have concluded that §113(g)(2)'s three-year removal action and six-year remedial action SOLs should apply.<sup>233</sup> The Fifth Circuit also employs this approach, but the Aviall decision will impact its application in such situations due to DOD's PRP status and the absence of a prior or pending §106 or §107 action against it.<sup>234</sup> The Ninth Circuit has indicated that it appears to favor either this approach, or possibly the §113(g)(3) approach illustrated in the next scenario.<sup>235</sup>)

Not surprisingly, Walrus moved for summary judgment contending that the applicable SOL had run.

Since none of the so-called triggering events had occurred, the court decided that §113(g)(2)'s three-year removal action and six-year remedial action SOLs should apply. Consequently, the court found that both the Army's \$2 million claim for the costs of removal actions and the \$8 million claim for the costs of the remedial actions were time-barred. This was because the February 1, 2001 suit was not "commenced ... within 3 years after the [January 1, 1995] completion of the removal action," nor "within 6 years after the [January 15, 1995] initiation of the physical on-site construction of the remedial action," in

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<sup>233</sup> Centerior, *supra* note 130 at 355; and Sun, *supra* note 122 at 1191, quoting from Bancamerica Commercial Corp. v. Mosher Steel of Kansas, 100 F. 3d 792, 800 (10th Cir. 1996) as amended, 103 F. 3d 80 (10th Cir. 1996), in which the Bancamerica court quotes County Line Investment Co. v. Tinney, 933 F. 2d 1508, 1517 (10th Cir. 1991).

<sup>234</sup> Aviall, *supra* note 90 at 137.

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keeping with §113(g)(2)(B). Thus, the court granted Walrus's motion for summary judgment, and awarded the Army nothing, even though Walrus was undisputedly responsible for 40% of Yoko GOCO's cleanup costs.

*Once again, in this scenario, the Army, for whatever reasons, was a §113(f)(1) contribution-claim plaintiff. Because of the jurisdiction's application of §113(g)(2)'s three-year/six-year approach in the absence of a §113(g)(3) triggering event, the Army wound up eating 100% of the environmental response costs because its contribution claim was time-barred. This was the same scenario-specific set of facts and had the same outcome as Scenario No. 1. Of course, depending upon the dates of the removal actions' completion and the remedial actions' initiation, such contribution claims could also have followed any of the same analysis and had any of the corresponding outcomes as their cost-recovery-action cousins in Scenario No.s 2, 3, & 4.*

SCENARIO NO. 8, CONTRIBUTION LESSON III: Based on the same fact pattern outlined above, the Army can clearly establish a *prima facie* case for reimbursement. This time the Army can prove that it completed its removal actions on January 1, 1997, by which time it had spent \$2 million thereon. Similarly, the Army's \$8 million remedial actions were initiated on January 15, 1997. Of course, it did not write a \$8 million-check the first day, but rather spent \$2 million per year over the course of the next four years. Consequently, by January 15, 1998, it had spent \$ 2 million; by January 15, 1999, it had spent \$4

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<sup>235</sup>

Pinal Creek, *supra* note 175 at 1305.



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million; by January 15, 2000, it had spent \$6 million; and by January 15, 2001, it had spent the full \$8 million. Thus, the Army's total contribution claim was \$10 million, \$2 million in removal actions plus \$8 million in remedial actions.

On February 1, 2001, the Army filed suit against Walrus under §113(f)(1), in the United States District Court for the Northern District of Oklahoma. (When there are expenditures for environmental response costs but no triggering events, this jurisdiction (and a few others) applies the three-year statute of limitations provided for in §113(g)(3) implying an applicable triggering event not expressly provided in §113(g)(3), by "borrowing" one from some other source.<sup>236</sup>)

True to form, Walrus argued that the SOL, whatever it was, had run.

Since none of the so-called triggering events had occurred, the court decided that §113(g)(3)'s three-year contribution claim SOL should apply. It then borrowed a triggering event from a non-CERCLA contribution-claim case that held that that a contribution action accrues when a party seeking contribution has paid more than its fair share of a common liability.<sup>237</sup> Acknowledging the undisputed evidence that the Army was responsible for 40% of the \$10 million cleanup costs, it concluded that that the Army had begun paying more than its fair share of the cost once it spent \$4 million. This had occurred by January 15, 1998, after it had spent \$2 million on removal actions and \$2 million on remedial actions. Applying the §113(g)(3) SOL to this date, the Army's contribution claim

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<sup>236</sup> Sun Co., Inc. (R&M) v. Browning-Ferris, Inc., 919 F. Supp. 1523, 1531 (N.D. Okla. 1996).rev'd in pertinent part, Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187 (10th Cir. 1997).

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was time-barred as of January 15, 2001. Thus, after five years and \$10 million, much like the Hyampom case, it was about two weeks too late. Consequently, the Army came up empty-handed, even though Walrus was undisputedly responsible for 40% of Yoko GOCO's cleanup costs.

*Once again, in this scenario, the Army, for whatever reasons, was a §113(f)(1) contribution-claim plaintiff, meaning it faced all of the oft-discussed contribution-claim-vs.-recovery-action disadvantages. Because of the jurisdiction's application of the §113(g)(3)'s three-year-SOL-with-a-borrowed-triggering-event approach, the Army's contribution claim was statutorily stale, even though it filed suit on February 1, 2001, just two weeks after it completed the cleanup on January 15, 2001. It should be noted that if the Army had been less efficient and had spent a little more time or a little more money conducting the same level of NCP-consistent cleanup, it could have "bought" those two weeks and its claim would have been timely. Similarly, if it had been a little more careless and thus been deemed even a few percentage points more responsible for the response costs, its claim would also have been timely. As should be painfully obvious by now, when it comes to SOL issues, everything is intensely fact-specific.*

*Hybrid Recovery/Contribution Scenarios:* The following two scenarios illustrate the role DOD plays when it can avail itself of neither a §107(a) nor a

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<sup>237</sup>

City of Merced, *supra* note 199 at 1334-1335.

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§113(f)(1) reimbursement mechanism, and when it becomes involved in both §107(a) and §113(f)(1) reimbursement mechanisms. On the one hand, as covered in Section VII, under Aviall DDO cannot exercise its §107(a) authority in the Fifth Circuit because it is a PRP, and neither can it avail itself there of §113(f)(1) without a prior or pending federal §106 or §107(a) action against it. Of course, DOD will never have a prior or pending federal §106 or §107(a) action against it in a voluntary cleanup situation. On the other hand, it is not uncommon for DOD to be involved in a plaintiff/defendant role reversal as a result of §107(a) and §113(f)(1) working in tandem. As described in Section VIII, DOD, notwithstanding its PRP status, can exercise its §107(a)(4)(A)-authority against fellow PRPs wearing its "Government-Entity Hat" as a cost-recovery plaintiff, and within three years thereof find itself wearing its "PRP Hat" as a contribution-claim defendant. Nevertheless, if DOD has to be involved in a contribution claim, it is much better off being there as a contribution-claim defendant, after having previously been a recovery-action plaintiff.

SCENARIO NO. 9, THE AVIALL MODEL: Based on the original fact pattern, it would appear that the Army can establish a *prima facie* case for reimbursement, but things are not always as they appear.

On February 1, 2001, the Army filed suit against Walrus in a United States district court in the Fifth Circuit for reimbursement under §107(a) and §113(f)(1). (As previously discussed, Aviall erroneously asserted that "a PRP [government or otherwise] cannot file a §107 suit against another PRP," before holding "that a

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party can seek a §113(f)(1) contribution claim only if there is a prior or pending federal §106 or §107(a) action against it.”<sup>238</sup>)

Having done its homework, Walrus moved for summary judgment.

Since the Army was a PRP and had no prior or pending §106 or §107(a) actions against it, based on Aviall, the court granted Walrus’s motion for summary judgment. As a conciliatory gesture, just before ejecting this federal agency, which was pursuing a federally-prescribed remedy under a federal statute in a federal court, the Aviall-obliged court advised the Army that it “may be able to rely on state environmental laws to recover costs from other liable parties.”<sup>239</sup> Though Walrus would have otherwise been responsible for 40% of Yoko GOCO’s cleanup, it paid the Army nothing.

*In this scenario, it does not matter when the Army’s removal actions were completed, when its remedial actions were initiated, or which approach the court would have embraced in the absence of a §113(g)(3) triggering event, because the SOL never becomes an issue. Unable to avail itself of either a §107(a) recovery action or a §113(f)(1) contribution action, under such circumstances in the Fifth Circuit, DOD is all dressed up with nowhere to go --except state courts.*

SCENARIO NO. 10, PLAINTIFF/DEFENDANT ROLE-REVERSAL: This hypothetical will pick up where Scenario No. 3, left off, although the circumstance it illustrates could arise anytime a §107(a)(4)(A) governmental-entity PRP is awarded a

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<sup>238</sup> Aviall, *supra* note 90 at 137.

<sup>239</sup> Aviall, *supra* note 90 at 145.

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judgment in a §107(a) cost recovery action against a fellow PRP. In Scenario No. 3, the Army, wearing its "Government-Entity Hat," filed suit against Walrus under §107(a), in an extra-Fifth Circuit district court that correctly acknowledged the Army's unique governmental status as an environmental steward pursuant to §107(a)(4)(A). Because its action was commenced within the §113(g)(2) SOL, in keeping with the strict, joint and several liability imposed by §107(a), the court awarded the Army the full amount of its combined \$10 million claim even though Walrus was only responsible for 40% of the cleanup costs.

Though the Army filed suit on February 1, 2001, it took an additional 15 months for the case to wind its way through the pre-trial and trial process before the court announced its decision on April 1, 2002. With this decision, Walrus now had a §113(g)(3)(A)-triggering event after which it has three years to commence a contribution claim against the Army and the other PRPs, namely IEEI and Sgt. Pepper. Specifically, the court's decision created "the date of judgment in [an] action under [CERCLA] for recovery of [any response costs or damages]," pursuant to §113(g)(3)(A). Thus, Walrus has until April 1, 2005 to commence a contribution claim against its fellow PRPs.

Unlike all the previous hypothetical situations where the Army was the plaintiff and Walrus the defendant, here the Army, wearing its "PRP Hat," is the defendant and Walrus the plaintiff. As a contribution-claim plaintiff, now Walrus not only has the burden of proof, but what it must prove is much more demanding than what the Army ever had to prove as a cost-recovery plaintiff.

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Walrus also has an orphan share problem that is virtually unknown to cost-recovery plaintiffs. Assuming Walrus files within three years, because it can prove the Army is responsible for 40% of the environmental response costs at Yoko GOCO, the Army will most likely have to pay Walrus \$4 million of the \$10 million it was awarded from Walrus in the §107(a) recovery action. That is the good news. The bad news for Walrus is that unlike §107(a)'s strict, joint and several liability, under §113(f)(1) the PRPs are merely severally liable. Consequently, even though Walrus can establish the Army's 40% of contribution, since IEEI is no more, and Sgt. Pepper is insolvent, there is a good chance IEEI's 15% and Sgt. Pepper's 5% orphan share will be absorbed entirely by Walrus.<sup>240</sup> (In other jurisdictions, however, "the costs of the orphan shares is distributed equitably among all the PRPs."<sup>241</sup>) Thus, even though Walrus was undisputedly responsible for 40% of the \$10 million cleanup costs, in addition to a longer, more expensive proceeding, it will probably end up paying for 60%, or \$6 million, of Yoko GOCO's \$10 million cleanup costs.

*Interestingly, there is a \$2 million or 20% difference in the Army's net recovery between Scenario No.s 6 and 10, even though in both cases the \$10 million action was timely brought, and the Army's responsibility was/will be recognized by the respective courts as being 40%. In Scenario No. 6, the Army ended up paying for \$6 million, or 60%, of Yoko GOCO's \$10 million cleanup*

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<sup>240</sup> Gould, *supra* note 176 at 913 & 915.

<sup>241</sup> Pinal Creek, *supra* note 175 at 1303.

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*costs. In Scenario No. 10, the Army ended up paying for only \$4 million, or 40%, of Yoko GOCO's \$10 million cleanup costs. The only difference between the two cases is that in Scenario No. 6, the Army is a §113(f)(1) contribution-claim plaintiff, and in Scenario No. 10, the Army is a §113(f)(1) contribution-claim defendant. Having voluntarily initiated the cleanup of Yoko GOCO, the only way the Army could wear its "PRP Hat" as a §113(f)(1) defendant was to have first worn its "Government-Entity Hat" as a §107(a)(4)(A) plaintiff. This role reversal would not be possible in the post-Aviall Fifth Circuit or in any other court that erroneously fails to recognize DOD's unique role as a §107(a)(4)(A) environmental steward, notwithstanding the fact that it may also be a PRP.*

SUMMARY: As has been discussed, the results of applying a reimbursement-related SOL can be quite unforgiving as the Hyampom case illustrated. To avoid such harsh consequences, a thorough SOL analysis requires a working knowledge of removal actions, remedial actions, cost recovery SOL triggering events, contribution SOL triggering events, and the variety of approaches the courts may take in their absence. Admittedly, these ten scenarios are contrived and unrealistic, in that most of the litigation-related resource-intensive aspects of these types of cases were stipulated at the very outset. Consequently, rather than plunging into the nitty-gritty trench warfare issues associated with what constitutes a removal action or a remedial action and when they, respectively, end and begin, these common cost recovery matters were resolved by scenario-

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specific statements of fact. The scenarios also avoided one of the hallmarks of CERCLA contribution litigation, the whole equitable-factor- (Gore or otherwise) response-cost-allocation-analysis issue, by simply declaring the PRP's responsibility in terms of "undisputed" percentages. Unlike the real world, even the math was easy in these scenarios. As convoluted as that all may be, perhaps the greatest disservice to reality committed by these ten hypothetical situations was Yoko GOCO's single-site limitation. Whether pursuing §107(a) recovery, or §113(f)(1) contribution, as discussed in Section II, §101(9)'s broad definition of "facility" makes it entirely possible and often probable for there to be numerous *smaller facilities within a single larger facility*. Thus it is not at all uncommon for a single GOGO to entail numerous facilities at divers locations, contaminated by a variety of wastes, and requiring different cleanup remedies. Just imagine how exponentially complex things become SOL-wise when these response cost matters are an issue arising from a single GOCO with a dozen or more cleanup sites, each of whose removal actions have been completed and remedial actions initiated at different times over the course of several years?



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*We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect. ... That land is a community is the basic concept of ecology, but that land is to be loved and respected is an extension of ethics.<sup>242</sup>*

**SECTION X**

**CONCLUSION: THE EXTENSION OF ETHICS**

For an act, the first word in the title of which is "comprehensive," CERCLA deals with many matters less than comprehensively, not the least of which are statutes of limitations. In this regard, CERCLA has taken a seemingly straightforward concept and turned it into a labyrinth of tortuously tedious definitions and convoluted, often contradictory, case law. Of course, this effort is obviously not an exhaustive treatment of CERCLA liability issues. Nevertheless, at this juncture it should be apparent that CERCLA's incomprehensibility has had an enormous impact on industry, and arguably, an even greater impact on the federal government in general and DOD in particular. Approximately \$6 billion is spent annually in the United States on the cleanup of sites regulated under CERCLA,<sup>243</sup> a significant portion of which is attributable to DOD cleanup of GOCOs spread throughout the country. Compounding this is the fact that most if

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<sup>242</sup> ALDO LEOPOLD, *A SAND COUNTY ALMANAC*, viii (Oxford University Press 1968) (1949).

<sup>243</sup> Michael B. Gerrard, *Risks of Hazardous Waste Sites versus Asteroid and Comet Impacts: Accounting for the Discrepancies in U.S. Resource Allocation*, Risk Analysis, Vol. 20, No. 6, 2000.

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not all of these GOCOs have multiple-facility cleanup sites, with their respective and collective assortments of removal and remedial actions started, and often completed, at different times, in both the absence and presence of §113(g)(3) triggering events.

These GOCOs span numerous jurisdictions across several United States Circuit Court of Appeals circuits, replete with their permutations of CERCLA response-cost-reimbursement-related SOLs. While all three of the judicial responses to the problem of contribution claims arising without tripping the SOL clock make sense in their own, twisted sort of way, none are without shortcomings. The Seventh Circuit has seemed to smile on the *no SOL/the SOL has yet to run* approach, the same approach from which the Ninth has distanced itself in leaning toward one of the other two solutions. Circuit-wise, this leaves only the Fifth, Tenth, and Sixth Circuits which have declared their intentions when it comes to *sans*-SOL-triggering-event contribution claims. From a lawyer's perspective, this means there is plenty of room for proactivity in aggressively advocating on the client's behalf. From a court's perspective, there is ample opportunity for creativity in making history by concocting yet another approach to the no-triggering-event contribution claim problem.

So, bottom line, is the SOL on these GOCO cleanup sites three years, six years, or is there even a SOL at all? It depends. What will the Fifth Circuit decide in its *en banc* rehearing of Aviall? Who knows. No less than sixteen years after SARA, will Congress step up to the plate and attempt to clarify the

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*contribution claim with no SOL triggering event* matter? Stranger things have happened, but I'm not holding my breath. Will the United States Supreme Court eventually intervene and restore the certainty that statutes of limitations are designed to further? Quite possibly.

These questions make the issues of whether to seek recovery/contribution or not, and the establishment of a *prima facie* case for such, seem somewhat adolescent. Yes, when cost-effective, DOD should exert maximum efforts to achieve reimbursement of voluntary cleanup costs from other responsible parties to include GOCO contractors. Certainly, any and all contamination and the corresponding response costs that can be conclusively attributable to GOCO-contractor-operator misconduct should be the contractor's sole responsibility and should not be incorporated as overhead costs to be passed on to other government contracts. No, establishing a GOCO *prima facie* case is not difficult (except perhaps in a contribution claim for voluntary cleanup costs where you have to prove that you have a prior or pending federal §106 or §107(a) action against you). Nevertheless, a clear, or at least an as-clear-as-possible understanding of the statute of limitations issues in which CERCLA cleanup costs are entangled, is imperative.

Theoretically, DOD could conduct twice as much environmental clean-up if it recouped half of its environmental response costs. We owe it to ourselves and to our succeeding generations to see the land, including GOCOs, as a

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community to which we belong, and not merely a commodity, which we possess.

The extension of ethics tomorrow begins with responsible ecology today.

9/24/2002